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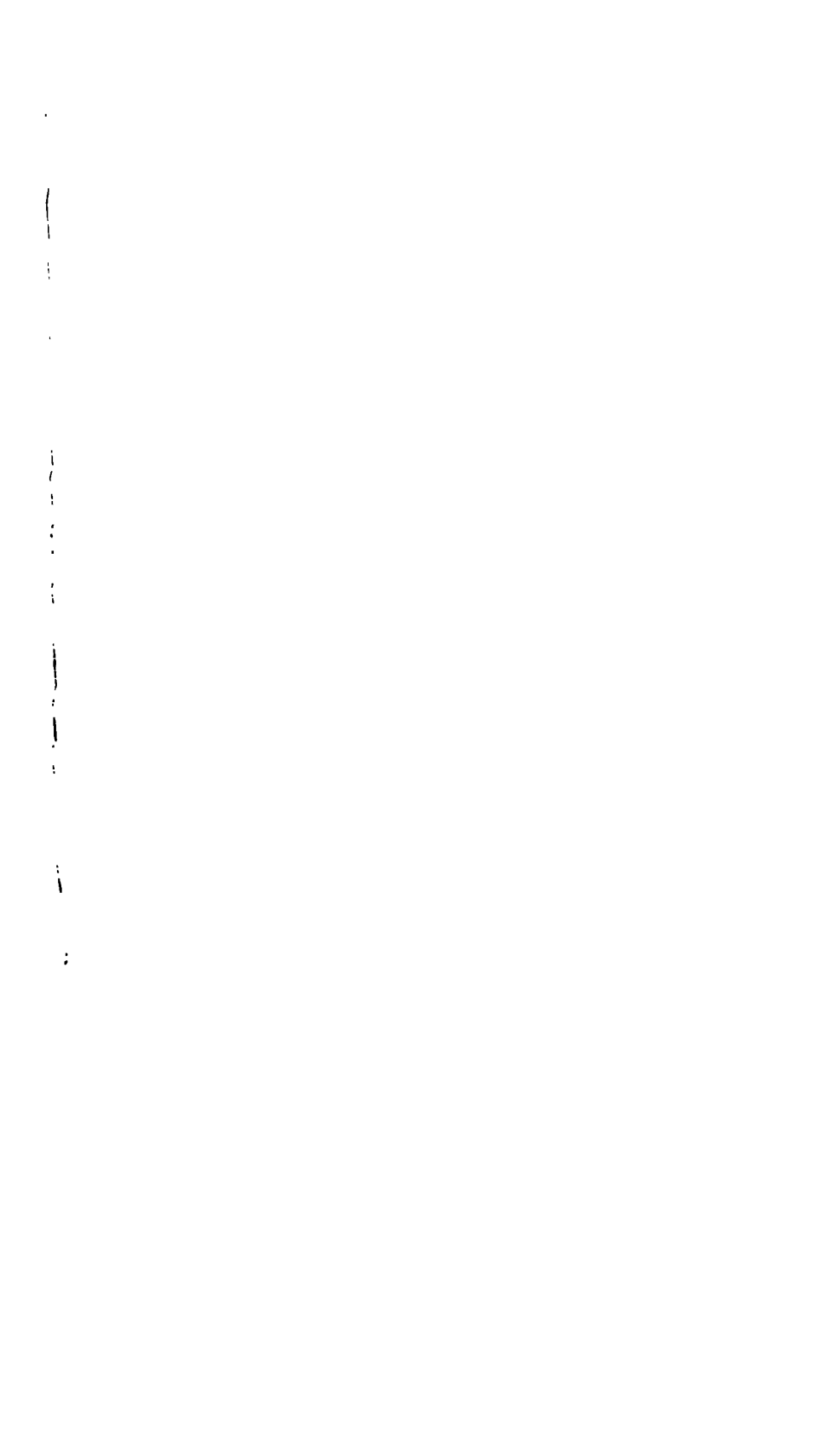
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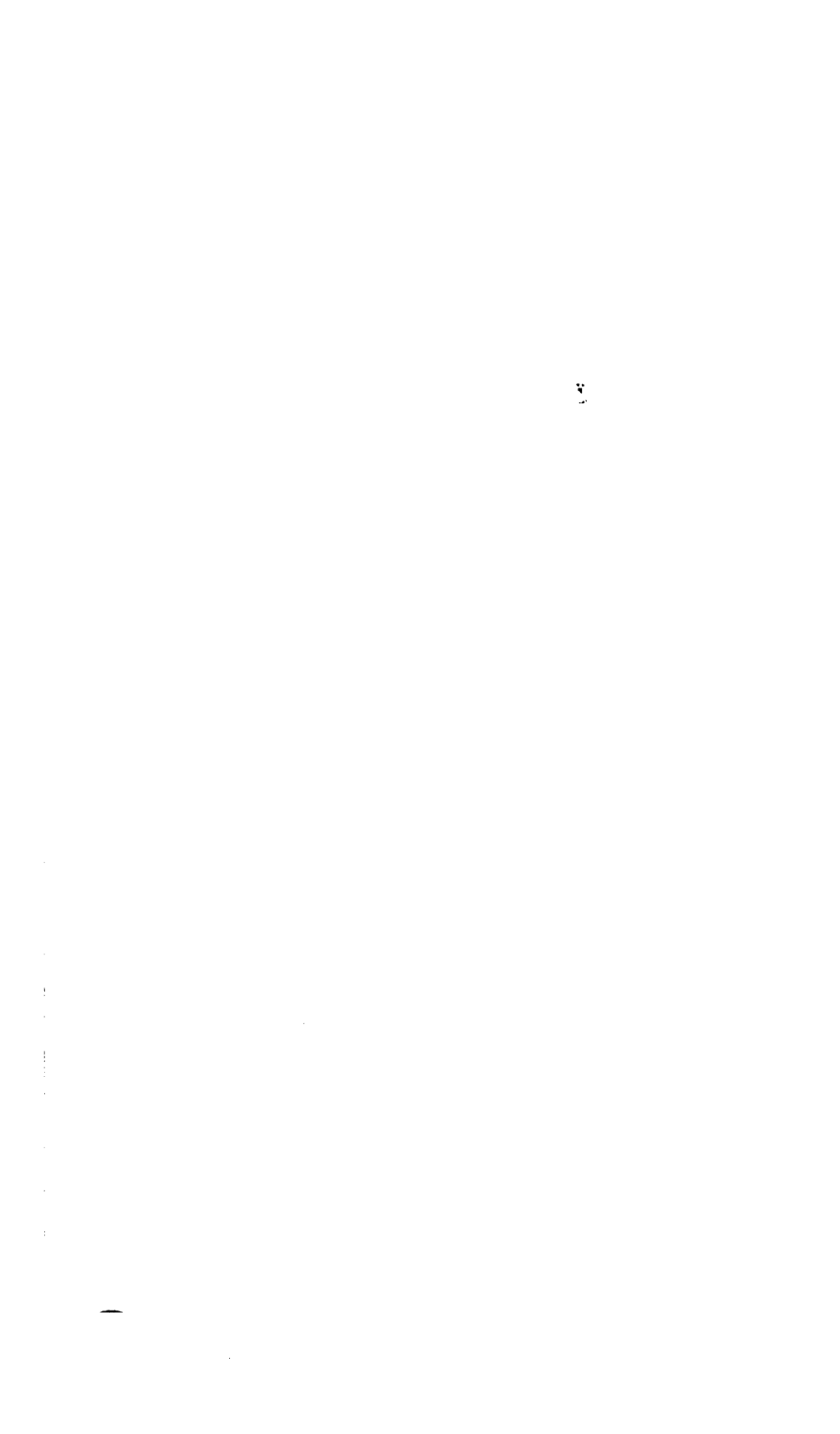
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY.

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XI.

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AMERICAN STATE REPORTS.

VOL. XI

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS. Vol. 86.	17-86
CALIFORNIA REPORTS. Vol. 77.	225-330
FLORIDA REPORTS Vol. 23.	331-404
GEORGIA REPORTS. Vol. 79.	405-461
ILLINOIS REPORTS. Vol. 127.	87-179
MICHIGAN REPORTS. Vols. 66, 67.	462-611
NEW YORK REPORTS. Vol. 114.	612-707
NORTH CAROLINA REPORTS. . . . Vol. 102.	708-777
OREGON REPORTS. Vol. 17.	778-866
PENNSYLVANIA STATE REPORTS. . . Vol. 125.	867-931
TEXAS APPEALS REPORTS. . . . Vol. 27.	180-224

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

- ALABAMA. — (83) 3; (84) 5; (85) 7; (86) 11.
ARKANSAS. — (48) 3; (49) 4; (50) 7.
CALIFORNIA. — (72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11.
COLORADO. — (10) 3; (11) 7.
CONNECTICUT. — (54) 1; (55) 3; (56) 7.
DELAWARE. — (5 Houst.) 1.
FLORIDA. — (22) 1; (23) 11.
GEORGIA. — (76) 2; (77) 4; (78) 6; (79) 11.
ILLINOIS. — (121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11.
INDIANA. — (112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10.
IOWA. — (72) 2; (73) 5; (74) 7; (75) 9.
KANSAS. — (37) 1; (38) 5; (39) 7; (40) 10.
KENTUCKY. — (83, 84) 4; (85) 7; (86) 9.
LOUISIANA. — (39 La. Ann.) 4; (40 La. Ann.) 8.
MAINE. — (79) 1; (80) 6; (81) 10.
MARYLAND. — (67) 1; (68) 6; (69) 9.
MASSACHUSETTS. — (145) 1; (146) 4; (147) 9.
MICHIGAN. — (60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11.
MINNESOTA. — (36) 1; (37) 5; (38) 8.
MISSISSIPPI. — (65) 7.
MISSOURI. — (92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10.
NEBRASKA. — (22) 3; (23, 24) 8.
NEVADA. — (19) 3.
NEW HAMPSHIRE. — (64) 10.
NEW JERSEY. — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7.
NEW YORK. — (107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10;
(114) 11.
NORTH CAROLINA. — (97, 98) 2; (99, 100) 6; (101) 9; (102) 11.
OHIO. — (45 Ohio St.) 4.
OREGON. — (15) 3; (16) 8; (17) 11.
PENNSYLVANIA. — (115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121
Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11.
RHODE ISLAND. — (15) 2.
SOUTH CAROLINA. — (28) 4.
TENNESSEE. — (85) 4; (86) 6; (87) 10.

TEXAS. — (33) 2; (33; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 3; (71) 20; (27 Tex. App.) 11.

VERMONT. — (30) 3.

VIRGINIA. — (32) 3; (33) 5; (34) 10.

WEST VIRGINIA. — (33) 3; (30) 3.

WISCONSIN. — (33) 2; (70, 71) 5; (72) 7; (73) 2.

AMERICAN STATE REPORTS.

VOL. XI.

CASES REPORTED.

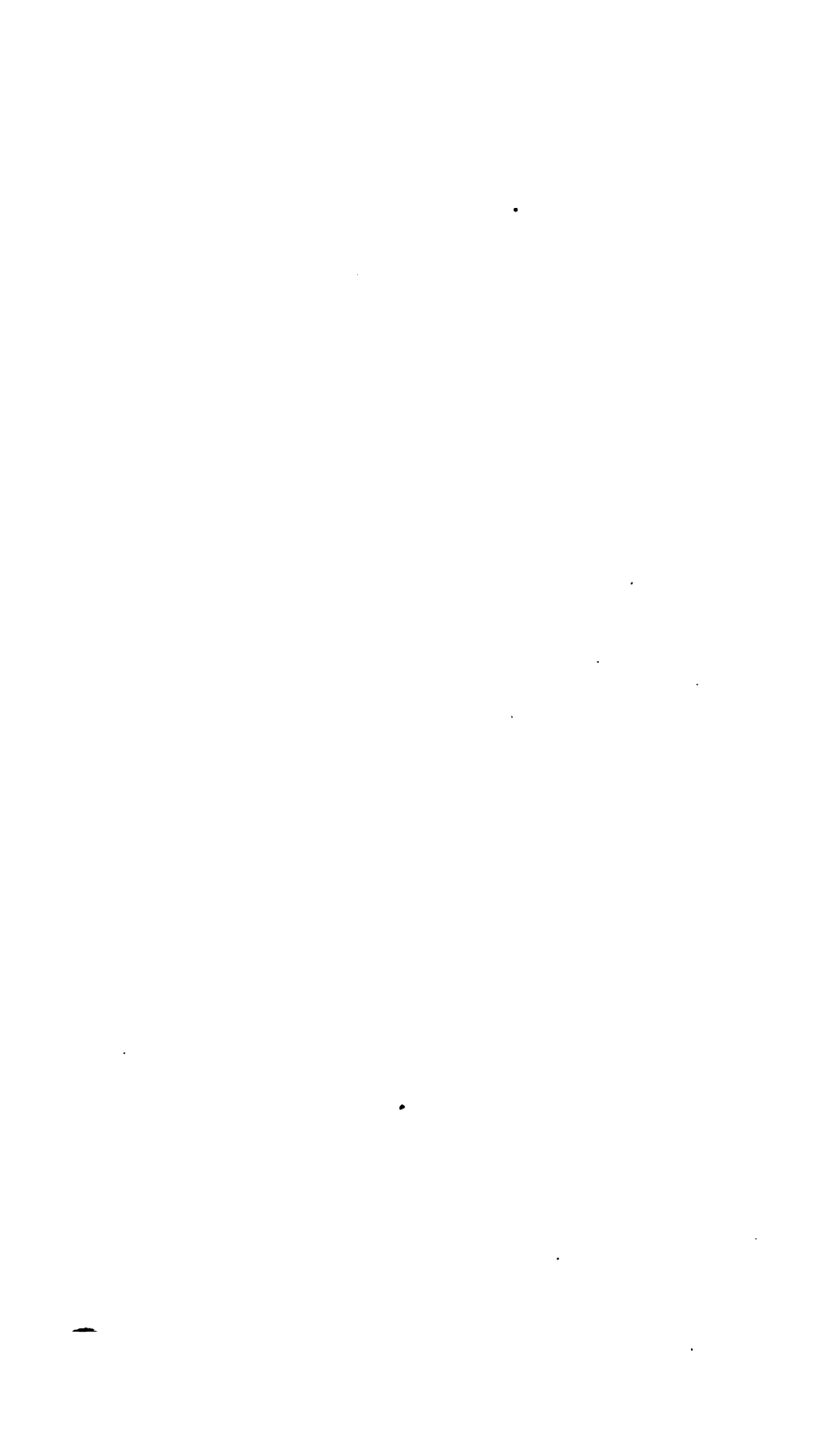
NAME.	SUBJECT.	REPORT.	PAGE.
Al Men, Ex parte.....	<i>Contempt</i>	77 Cal. 198.....	263
Anderson v. State.....	<i>Negligent homicide</i>	27 Tex. App. 177.	189
Arpsinger v. Macnaughton.....	<i>Salé—warranty</i>	114 N. Y. 535.....	687
Armstrong v. Medbury.....	<i>Negligence</i>	67 Mich. 250.....	585
Bald v. Herring.....	<i>Promissory notes</i> ...	77 Cal. 572.....	307
Brd v. State.....	<i>Adultery</i>	27 Tex. App. 635.	214
Bolster v. State.....	<i>Adultery</i>	86 Ala. 67.....	20
Brown's Appeal.....	<i>Insurance</i>	125 Pa. St. 308....	908
Brown v. Brabb.....	<i>Assignment for benefit of cred'tors.</i>	67 Mich. 17.....	549
Brown v. Mitchell.....	<i>Fraud. conveyances</i>	102 N. C. 347.....	748
Bull v. Coe.....	<i>Married women</i>	77 Cal. 54.....	235
Cassif v. Blanchard Navigation Co.	<i>Negligence</i>	66 Mich. 633.....	541
Carlson v. Williams.....	<i>Acknowledgments —marr'd women.</i>	77 Cal. 89.....	243
Carpenter v. Van Otinder.....	<i>Rule in Shelley's case</i>	127 Ill. 42.....	92
Cassfield v. Clark.....	<i>Adverse possession</i> ...	17 Or. 473.....	845
Cassidy v. State.....	<i>Larceny</i>	79 Ga. 564.....	447
Central City Ins. Co. v. Oates.....	<i>Insurance</i>	86 Ala. 558.....	67
Chicago City R'y Co. v. Robinson.	<i>Negligence</i>	127 Ill. 9.....	87
Chisley v. Atkinson.....	<i>Master and servant</i>	23 Fla. 206.....	367
Clark v. McNeal.....	<i>Bona fide purchaser</i>	114 N. Y. 237.....	638
Clark v. Wilson.....	<i>Fraud. conveyances</i>	127 Ill. 449.....	143
Clements v. Tillman.....	<i>Contempt</i>	72 Ga. 451.....	441
Coffelt v. State.....	<i>Robbery</i>	27 Tex. App. 608.	205
Coleman v. Allen.....	<i>Malicious prosec'n.</i>	79 Ga. 637.....	449
Columbus etc. R'y Co. v. Bridges.	<i>Railways</i>	86 Ala. 448.....	58
Connelly v. Knickerbocker Ice Co.	<i>Negligence</i>	114 N. Y. 104.....	617
Continental Ins. Co. v. Rackman.	<i>Insurance</i>	127 Ill. 364.....	121
Coper v. Lake Shore etc. R'y Co.	<i>Negligence</i>	66 Mich. 261.....	492
Coper v. State.....	<i>Criminal law</i>	86 Ala. 610.....	84
Cuswoll etc. B. B. Co.'s Appeal.	<i>Contracts</i>	125 Pa. St. 232....	838

NAME.	SUBJECT.	REPORT.	PAGE.
County Board of Education v. Bateman.....	} <i>Official bonds</i>	102 N. C. 52.....	706
Cowan v. Creditors.....			
Crescent Ins. Co. v. Bear.....	} <i>Partnership— garnishment.</i> }	23 Fla. 50.....	331
Crocheron v. State.....			
	<i>Larceny</i>	86 Ala. 64.....	18
De Berry v. Nicholson.....	<i>Elections</i>	102 N. C. 465.....	767
Dempsey v. State.....	<i>Malicious prosec'n.</i>	27 Tex. App. 269.	193
Doyle v. Wade.....	<i>Ejectment</i>	23 Fla. 90.....	334
Durbin v. Oregon Railroad and Navigation Company.....	} <i>Railways</i>	17 Or. 5.....	778
Emery v. Raleigh etc. R. R. Co. .	<i>Railways</i>	102 N. C. 209.....	727
Erie etc. R. R. Co. v. Smith.....	<i>Evidence</i>	125 Pa. St. 259....	895
Estate of Cook.....	<i>Judgments</i>	77 Cal. 220.....	267
Evans v. Cleary.....	<i>Married women</i>	125 Pa. St. 204....	886
Fahey v. State.....	<i>Constitutional law</i> ..	27 Tex. App. 146.	182
Farrell v. Richmond etc. R. R. Co.	<i>Stoppage in transitu.</i>	102 N. C. 390.....	760
Faulcon v. Johnston.....	<i>Evidence</i>	102 N. C. 284.....	737
Fenton v. Scott.....	<i>Elections</i>	17 Or. 189.....	801
Finlayson v. Finlayson.....	<i>Deeds</i>	17 Or. 347.....	836
First National Bank of Elgin v. Schween.....	} <i>Sale or bailment</i>	127 Ill. 573.....	174
Fowler's Appeal.	<i>Trusts</i>	125 Pa. St. 383....	902
Fredenburg v. Northern C. R'y Co.	<i>Railways</i>	114 N. Y. 582.....	697
Furgeson v. Jones.....	<i>Jurisdiction</i>	17 Or. 204.....	808
Gage v. Stewart.....	<i>Tax sales</i>	127 Ill. 207.....	116
Galloway v. Estate of McPherson.	<i>Funeral expenses</i> ...	67 Mich. 546.....	596
Gannon v. People.....	<i>Murder</i>	127 Ill. 507.....	147
Georgia Railroad and Banking Company v. Friddell.....	} <i>Railways</i>	79 Ga. 489.....	444
Goodwin v. Sims.....	<i>Judicial sales</i>	86 Ala. 102.....	21
Griffin v. Fries.....	<i>Ejectment</i>	23 Fla. 173.....	361
Hangen v. Hachemeister.....	<i>Chattel mortgage</i> ...	114 N. Y. 566.....	691
Hartman v. Young.....	<i>Elections</i>	17 Or. 150.....	787
Hayes v. Nourse.....	<i>Lis pendens</i>	114 N. Y. 595.....	700
Head v. Georgia Pacific R'y Co.	<i>Carriers</i>	79 Ga. 358.....	434
Hexter v. Bast.....	<i>Sale—deceit</i>	125 Pa. St. 52.....	874
Hill v. Finigan.....	<i>Pledge</i>	77 Cal. 267.....	279
Holmes v. Tallada.....	<i>Pensions</i>	125 Pa. St. 133....	880
Hooker v. Sugg.....	<i>Insurance</i>	102 N. C. 115.....	717
Horse and Dummy R. R. Co. v. Donoghue.....	} <i>Assessment</i>	127 Ill. 27.....	90
Houston v. Timmerman.....	<i>Lis pendens</i>	17 Or. 499.....	848
Hurst v. State.....	<i>Criminal law</i>	86 Ala. 604.....	79
Hussner v. Brooklyn City R. R. Co.	<i>Damages</i>	114 N. Y. 433.....	679
Jenks v. Colwell.....	<i>Sales of personalty</i> ..	66 Mich. 420.....	502
Jones v. Pashby.....	<i>Boundaries</i>	67 Mich. 459.....	589

NAME.	SUBJECT.	REPORT.	PAGE.
Kean v. Detroit Copper and Brass Rolling Mills.....	} <i>Master and servant.</i>	66 Mich. 277.....	492
Kilham v. Augusta etc. R. R. Co.			
King v. State.....	<i>Forgery</i>	27 Tex. App. 567.	208
Knight v. Morrison.....	<i>Executions</i>	79 Ga. 55.....	406
Leonard v. Poole.....	<i>Co-conspirators</i>	114 N. Y. 371.....	667
Lewis v. Long.....	<i>Neg. instruments</i>	102 N. C. 206.....	725
Levens v. Fowler.....	<i>Agency</i>	79 Ga. 134.....	407
Lunsford v. Districh.....	<i>Malicious process</i> 's.....	86 Ala. 250.....	37
Maloney v. Dewey.....	<i>Lunatics</i>	127 Ill. 395.....	131
Manning v. Phippen.....	<i>Wills</i>	86 Ala. 357.....	46
Marshall v. Widdicombs Furni- ture Co.....	} <i>Master and servant.</i>	67 Mich. 167.....	573
McClellan v. Solomon.....			
McDade v. State.....	<i>Homicide</i>	27 Tex. App. 641.	216
McKay v. Williams.....	<i>Agency</i>	67 Mich. 547.....	507
McNulty, Ex parte.....	<i>Constitutional law</i> ..	77 Cal. 164.....	257
Medis v. State.....	<i>Sodomy</i>	27 Tex. App. 194.	192
Meritz v. Lavelle.....	<i>Mining claims</i>	77 Cal. 10.....	229
Murray v. McNealy.....	<i>Chattel mortgages</i> ..	86 Ala. 234.....	33
National Park Bank of N. Y. v. Seaboard Bank.....	} <i>Drafts</i>	114 N. Y. 28.....	612
National Ulster Co. Bank v. Madden.....			
Norris v. Savannah etc. R'y Co.	<i>Carrier of freight</i> ..	23 Fla. 192.....	365
Orthwein v. Thomas.....	<i>Bastards</i>	127 Ill. 554.....	150
Palatka etc. R. R. Co. v. State...	<i>Obstruct'g highway</i> .	23 Fla. 546.....	395
Patterson v. Hayden.....	<i>Seduction</i>	17 Or. 238.....	822
Peck v. Peck.....	<i>Statute of frauds</i> ..	77 Cal. 106.....	244
Pennsylvania Schuylkill Valley R. R. Co. v. Cleary.....	} <i>Eminent domain</i> ..	125 Pa. St. 443....	913
People v. Aikin.....			
People v. Bentley.....	<i>Robbery</i>	77 Cal. 7.....	225
People v. Parker.....	<i>Forgery</i>	67 Mich. 222.....	578
Perkins v. Stimmel.....	} <i>Guardian and curatels</i>	114 N. Y. 389.....	659
Perry v. City of Big Rapids.....			
Peterson v. Chicago etc. R'y Co.	<i>Master and servant</i> .	67 Mich. 102.....	564
Philadelphia etc. R. R. Co. v. Beck	<i>Carriers</i>	125 Pa. St. 620....	924
Phillips v. Dewald.....	<i>Animals</i>	79 Ga. 732.....	458
Pingree v. Detroit etc. R. R. Co.	<i>Carriers</i>	66 Mich. 143.....	479
Powers's Appeal.....	<i>Equity</i>	125 Pa. St. 175....	892
Queen Ins. Co. v. Young.....	<i>Insurance</i>	86 Ala. 424.....	51
Randall v. Bourguardes.....	} <i>Foreclosure— mortgages.</i> }	23 Fla. 264.....	379
Real Estate Title Insurance and Trust Co.'s Appeal.....			
Roid v. Ladue.....	<i>Assumpsit</i>	66 Mich. 22.....	462

NAME.	SUBJECT.	REPORT.	PAGE.
Robertson, Ex parte.....	Contempt.....	27 Tex. App. 623.	297
Robinson v. Dunn.....	<i>Legislature— Employees.</i>	77 Cal. 473.....	297
Root v. Long Island R. R. Co. . .	<i>Discrimination by railway comp's.</i>	114 N. Y. 300.....	643
Ruggles v. American C. Ins. Co. of St. Louis.....	<i>Insurance</i>	114 N. Y. 415.....	674
Sawyer v. Bray.....	<i>Executions</i>	102 N. C. 79.....	713
Schmittler v. Simon.....	<i>Parol testimony</i>	114 N. Y. 176.....	621
Seith v. Philadelphia Traction Co.	<i>Trespass</i>	125 Pa. St. 397.....	905
Seymour v. Smith.....	<i>Appeal bond</i>	114 N. Y. 481.....	683
Shakespear v. Smith.....	<i>School diet—order</i>	77 Cal. 636.....	327
Sharp v. Hall.....	<i>Deed or will</i>	86 Ala. 110.....	28
Shelton v. State.....	<i>Carrying pistol</i>	27 Tex. App. 443.	200
Sherwood v. Walker.....	<i>Sale</i>	66 Mich. 568.....	531
Slater v. Chapman.....	<i>Master and servant</i>	67 Mich. 523.....	583
Smith v. Clewa.....	<i>Evidence</i>	114 N. Y. 190.....	637
Smith v. State.....	<i>Adultery</i>	86 Ala. 57.....	17
State v. Deane.....	<i>Election</i>	23 Fla. 121.....	343
State v. Godfrey.....	<i>Assault</i>	17 Or. 300.....	830
Sterne, Ex parte.....	<i>Judgments— habeas corpus.</i>	77 Cal. 156.....	251
Stevenson v. Fox.....	<i>Wills</i>	125 Pa. St. 568....	922
Stilly v. State.....	<i>Carrying pistol</i>	27 Tex. App. 445.	201
Stock Exchange v. Board of Trade.	<i>Market quotations</i>	127 Ill. 153.....	107
Sullivan v. Lear.....	<i>Evidence of value</i>	23 Fla. 463.....	388
Tapia v. Demartini.....	<i>Mortgages</i>	77 Cal. 383.....	288
Temple v. Baker.....	<i>Neg. instruments</i>	125 Pa. St. 634....	926
Terry v. Rodahan.....	<i>Ejectment</i>	79 Ga. 278.....	420
Tharp v. Yarbrough.....	<i>Deeds</i>	79 Ga. 382.....	439
Thropp v. Susquehanna Mutual Fire Insurance Company.....	<i>Insurance</i>	125 Pa. St. 437....	909
Tousey v. Roberts.....	<i>Landl'd and tenant</i>	114 N. Y. 312.....	655
Township of Plymouth v. Graver..	<i>Highways</i>	125 Pa. St. 24.....	867
Ulbright v. Eufaula Water Co....	<i>Watercourses</i>	86 Ala. 567.....	72
Village of Jefferson v. Chapman..	<i>Munic. corporat'ns</i>	127 Ill. 438.....	136
Wallace v. Bentley.....	<i>Agency</i>	77 Cal. 19.....	231
Webber v. Barry.....	<i>Trespass</i>	66 Mich. 127.....	466
Whitney v. Blackburn.....	<i>Elections</i>	17 Or. 564.....	857
Willard v. State.....	<i>Corpus delicti</i>	27 Tex. App. 398.	197
Williams v. McFadden.....	<i>Vendor and vendee</i>	23 Fla. 143.....	345
Wilson v. Atkinson.....	<i>Adverse possession</i>	77 Cal. 485.....	299
Wilson v. State.....	<i>Perjury</i>	27 Tex. App. 47..	180
Wistar's Appeal.....	<i>Partition</i>	125 Pa. St. 526....	917
Witherington v. Mason.....	<i>Homestead</i>	86 Ala. 245.....	41
Wright v. Dickinson.....	<i>Vendor and vendee</i>	67 Mich. 590.....	602

AMERICAN STATE REPORTS.
VOL. XI



CASES
IN THE
SUPREME COURT
OF
ALABAMA.

SMITH *v.* STATE.

[86 ALABAMA, 57.]

ORIGINAL LAW — ADULTERY. — Conviction for adultery is proper upon proof showing adulterous intercourse between the parties not less than four different times within the period of a month, with a confession by defendant that he had indulged in such illicit intercourse whenever he desired; and the jury may determine whether there existed in the minds of the parties a purpose to continue the adulterous intercourse, so as to constitute "living together in adultery," within the meaning of section 4012, Criminal Code of Alabama.

CONVICTION FOR ADULTERY. — The instructions asked and refused were as follows: "1. The jury are not authorized to infer that the parties lived together in a state of adultery or fornication from the mere fact that they had sexual intercourse as many as four times within the same month; nor are they authorized to infer, from these facts alone, an intention on their part to continue these acts; there must be evidence to show a living together in adultery. 2. The fact that defendant and said female lived in the same house for about a month, and had sexual intercourse four times, two of which were in the house and the other two at other places, is not, of itself, sufficient to show the state or condition existing between the parties, but there must be other evidence to show the state or condition denounced by the statute."

J. D. Gardner, for the appellant.

Thomas N. McClellan, attorney-general, for the state.

SOMERVILLE, J. The evidence in this case, introduced on the trial, unquestionably authorized the jury to infer that the defendant lived in a state of adultery with the female named in the indictment. The facts show adulterous intercourse not less than four different times, extending through a period of

one month, with a confession by the defendant that he had indulged in such illicit intimacy with said female whenever he desired. It was for the jury, under the circumstances, to say whether there existed in the minds of the parties a purpose to continue the adulterous intercourse so as to constitute a "living together in adultery," within the meaning of the statute: *Crim. Code 1886, sec. 4012; Hall v. State, 53 Ala. 463; Smith v. State, 39 Id. 554; Collins v. State, 14 Id. 608; Bodiford v. State, decided at present term.*

The charges requested by the defendant invaded the province of the jury, and were properly refused.

Affirmed.

ADULTERY, WHAT IS: See monographic note to *Commonwealth v. Call, 32 Am. Dec. 289, 290.*

CROCHERON v. STATE.

[85 ALABAMA, 64.]

ORIGINAL LAW — LARCENY. — A servant employed on a farm, who has the care and custody of a mule belonging to his master, is guilty of larceny when he fraudulently converts the mule to his own use and sells it.

CONVICTION for larceny. Defendant was employed by one Marx as a farm-hand, and while so employed had the custody and care of a mule for the purpose of plowing with it. While so employed he took the mule and plowed with it until sunset one day, after which Marx, the owner, did not see it for some days, when he found it in the custody of one Childs, to whom defendant had sold it. The court refused to charge the jury, at defendant's request, "that if they believe the defendant had charge of the mule, and took it out of the plow whilst in his custody, then he is not guilty of larceny."

John C. Anderson, for the appellant.

Thomas N. McClellan, attorney-general, for the state.

SOMERVILLE, J. The conviction of the defendant for larceny was proper under the circumstances. The prosecutor had parted only with the custody of the mule, as distinguished from the possession, which was still in him as owner, although the defendant had the custody of the animal as mere employee or servant. It has often been decided, and is now settled law, that goods in the bare charge or custody of a ser-

vant are legally in the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use: *Oxford v. State*, 33 Ala. 416; 2 Bishop on Criminal Law, 7th ed., sec. 824.

It is accordingly said by Lord Hale that it would be larceny if a butler should appropriate his master's plate, of which he had charge; or the shepherd, his master's sheep in his custody; and so of an apprentice who feloniously embezzles his master's goods: 1 Hale, 506; Roscoe's Criminal Evidence, 7th ed., *639. In all such cases, the custody of the servant is distinguishable from that of a bailee, or other person who has a special property in the goods, by reason of being under a special contract with respect to them. A mere servant or employee has no such special property: 3 Greenl. Ev., 14th ed., sec. 162. Where, however, a bailee having such special property in goods converts them to his own use, no conviction of larceny can be had without proving a fraudulent or felonious intention on his part at the time he received the goods in bailment: 2 Wharton on Criminal Law, 9th ed., sec. 963; *Watson v. State*, 70 Ala. 13; 45 Am. Rep. 70.

The charge requested by the defendant was in direct conflict with this view of the law, and was properly refused.

The judgment is affirmed.

LARCENY — MASTER AND SERVANT. — It is larceny in a servant to open a package intrusted to his care, and take away any part of the goods therein, and dispose of them to his own use *asimo furandi*: *State v. Fairclough*, 29 Conn. 47; 76 Am. Dec. 590. If the goods of a master fraudulently appropriated by his servant were in the actual or constructive possession of the master at the time they were taken, the offense of the servant will be larceny: *Commonwealth v. Berry*, 99 Mass. 428; 96 Am. Dec. 767.

LARCENY — WHAT CONSTITUTES THE CRIME. — There must be a wrongful taking possession of the goods of another, with intent to deprive the owner of his property, either permanently or temporarily. The accused must have acquired dominion, so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent. But the caption may be constructive: *Fremier v. State*, 85 Ala. 17; 7 Am. St. Rep. 21, and note 23; note to *State v. Heman*, 57 Am. Dec. 271-286.

BODIFORD v. STATE.

[86 ALABAMA, 67.]

CRIMINAL LAW — ADULTERY. — To constitute "living in adultery" under section 4012, Alabama Criminal Code, a single or occasional adulterous act, without more, is not sufficient. There must be a continuation, or agreement for continuation, coupled with one or more acts; but when such acts and circumstances are proved, the jury may determine whether there was such continuation as amounts to living together, or a mutual guilty consent, express or implied, for such continuation. The parties need not occupy the same dwelling to constitute the crime, if such guilty consent is found.

J. D. Gardner, for the appellant.

Thomas N. McClellan, attorney-general, for the state.

STONE, C. J. To constitute a living in adultery, within the statute (Code 1886, sec. 4012), a single or occasional act, without more, is not sufficient. There must be continuation, or an agreement for continuation, coupled with one or more acts, before it can be affirmed that the relation is established. It is a crime of darkness and secrecy, and hence always difficult of direct proof. On this account it is held that when acts and complicating circumstances are proved, it becomes largely a question for the jury to determine whether there was in fact such continuation as amounted to a living together, or, what is equivalent to it, a mutual guilty consent, express or implied, for such continuation. And the parties need not occupy the same dwelling, if there was a mutual expectation and understanding that the relation was to be kept up, or if in fact it was kept up, so as to satisfy the jury, beyond a reasonable doubt (or, its equivalent, to a moral certainty), that there must have been such understanding.

As the antithesis of this, however, a single act, or occasional acts, not indicating a consensive or pre-arranged continuation of the illicit conduct, would not be a living together within the meaning of the statute: *Collins v. State*, 14 Ala. 608; *Quartemas v. State*, 48 Id. 269; *Hall v. State*, 53 Id. 463; *Clark's Manual*, sec. 1546; *State v. Crowley*, 13 Ala. 172.

The proof of adulterous cohabitation within twelve months before the indictment was found was not very full; but, considered in connection with their proven previous conduct, it was sufficient to authorize its submission to the jury.

There was a separate exception reserved to three charges given at the instance of the state. The circuit court, in each

of these rulings, stated the law correctly, as we have declared it above.

Affirmed.

ADULTERY — WHAT CONSTITUTES THE CRIME: See monographic note to *Commonwealth v. Call*, 32 Am. Dec. 289, 290; compare *Smith v. State*, ante, p. 17. In order to constitute the offense of lewd and lascivious cohabitation, it is essential that it be proved that the parties cohabit together, — that is, live together in the same house as man and wife; and proof of occasional acts of illicit intercourse is not of itself sufficient: *Pruner v. Commonwealth*, 22 Va. 115. To cohabit with another in adultery, within the meaning of the Indiana Revised Statutes, is for a man and a woman to live together in the manner of husband and wife, while not in reality being such, for a period of time: *Jackson v. State*, 116 Ind. 464. Where an indictment charged that defendants "did unlawfully live together in adultery, having carnal intercourse with each other," under the Penal Code of Texas adultery being committed either by the living together and having carnal intercourse, or by habitual carnal intercourse without living together, proof of carnal intercourse while not living together is insufficient to convict of the crime: *Miller v. State*, 24 Tex. App. 346.

GOODWIN v. SIMS.

[85 ALABAMA, 102.]

JURISDICTION OF PROBATE COURT to order the sale of lands of a decedent is statutory and limited, and must appear from the record. No intendants will be made in its favor, but such jurisdiction attaches when a petition is filed by the proper party, setting forth any of the statutory grounds for a sale; and jurisdiction having once attached, any intervening errors or irregularities in the proceedings will not avail to avoid the sale when collaterally impeached.

PROBATE COURT — JURISDICTION — NOTICE TO NON-RESIDENT. — Recital in the record of a probate court that a party, being a non-resident, was notified of an application for the sale of land of a decedent, and of the day set for the hearing, by publication as required, is conclusive on collateral attack, when not negated or falsified by the record itself.

JUDICIAL SALE — MISTAKE IN RECORD — COLLATERAL ATTACK. — When the inspection of the entire record in proceedings for the sale of a decedent's land discloses the nature and extent of a clerical error therein, such record will correct itself, and the court will treat it as corrected when the validity of the proceedings is collaterally attacked.

JUDICIAL SALE — JURISDICTION. — When a court of limited jurisdiction by the recitals in its decree ascertains a jurisdictional fact, such adjudication is final and conclusive when the decree is collaterally assailed; and when the decree is silent, such jurisdictional fact may appear from the other parts of the record.

JURISDICTION. — ENTIRE RECORD OF COURT imports absolute verity, and the recitals in a decree may be explained, limited, or qualified by other parts of the record, and it may be looked to to ascertain the jurisdictional facts when there is no finding by the court; but when the power to

ascertain the jurisdictional facts is conferred on the court, and it adjudges jurisdiction in itself, that is not overcome on collateral attack, because other parts of the record may not uphold such finding. The falsity of such finding must be affirmatively proved.

JUDICIAL SALE — RECITALS IN DECREE CONCLUSIVE — Where a decree of sale of a decedent's lands declares that depositions of witnesses were taken upon interrogatories as to the necessity of the sale of infant's interests therein, and were submitted by the petitioner, and ordered to be filed of record, it will be conclusively presumed on collateral attack that such depositions on which the court acted were taken as in chancery proceedings as required by statute.

A. Y. Harper, for the appellant.

Hewitt, Walker, and Porter, contra.

CLOPTON, J. The admission that Thomas Goodwin was seised and possessed of the land sued for at the time of his death, and that plaintiff, who is appellant, is one of his twelve heirs, shows *prima facie* a title, which entitled the plaintiff to recover an undivided one-twelfth interest, unless his title has been divested in some legal mode. In order to show that it had been divested, the defendant introduced in evidence, against the objection of plaintiff, a transcript of the proceedings in the probate court, under which the land was sold and conveyed to defendant by the administrator of the deceased. The question arises on the validity of the order of sale, which is impeached, on the ground that the record does not affirmatively show the jurisdictional facts.

That the jurisdiction of the probate court to order the sale of the lands of a decedent is statutory and limited, and that it must appear from the record, has been placed, by the repeated decisions of this court, beyond the pale of discussion. No intendments will be made in favor of the jurisdiction from its mere exercise. But it is also well settled that the jurisdiction attaches when a petition is filed by a proper party, setting forth any of the statutory grounds for a sale; and that jurisdiction having once attached, any intervening errors or irregularities in the proceedings will not avail to avoid the sale when collaterally impeached. It has accordingly been held that though the failure to issue citation to the resident heirs, or to make publication to the non-residents, will be sufficient to reverse the proceedings on appeal, such failure does not affect the validity of the order of sale on a collateral attack: *Field v. Goldsby*, 28 Ala. 218. But no intendment of notice need be indulged in the present case. The record recites that the plaintiff, being a non-resident, was notified of

the application for the sale, and of the day set for hearing the same, by publication in a newspaper published in the county. This recital is conclusive when not negatived or falsified by the record itself.

It is further objected that no day was appointed for the hearing of the application before the decree of sale was made. There appears of record a preliminary order, setting a day for the hearing of the petition, and for the issue of citations to the resident heirs, and that the plaintiff, being a non-resident, be notified by publication. It is objected, however, that this order, as appears from the record, was made December 4, 1878, nearly twelve months after the decree of sale. The petition was verified December 4, 1877. The order recites that "on this day comes Joseph Martin, administrator of Thomas Goodwin, deceased, and presents to the court his petition in writing, and under oath, praying for an order to sell the lands"; and appoints and sets January 15, 1878, as the day for hearing the petition. Though an error which may have occurred in a duly certified transcript of judicial proceedings cannot be corrected or amended by parol evidence, yet when an inspection of the entire record discovers the nature and extent of the error, it corrects itself; and the court will regard it as corrected when the validity of the proceedings is collaterally impeached: *King v. Martin*, 67 Ala. 177. As the preliminary order recites that the petition was presented on the same day on which the order was made, and sets January 15, 1878, for the hearing of the petition, which was several months prior to the date of the order, as shown by the record, and as the record discloses that the petition was verified on the same day of the same month of the preceding year, it is manifest that a mistake occurred in the date of the preliminary order. The record corrects itself; otherwise, it would present the absurdity of an order setting a day for the hearing of an application several months anterior to its rendition.

It is further objected that the record does not show affirmatively that evidence was taken as in chancery proceedings, establishing the necessity for a sale. The statute declares that no order for the sale of land belonging to any estate for the payment of debts, or for division, must be made when there are minors interested in such estate, unless the probate court has taken evidence by deposition as in chancery proceedings, showing the necessity for such sale; and that any

order of sale made without a compliance with these statutory requisitions shall be wholly void: Code 1886, sec. 2114. The decree of sale recites: "And it appearing to the satisfaction of the court, from the allegations contained in the said petition, and from the depositions of Thomas O. Ferguson and William Weems, disinterested witnesses, taken upon interrogatories and submitted by the petitioner, which depositions are ordered to be filed of record," that the lands cannot be equitably divided among the heirs, and that a sale is necessary. It appears from the record that on the same day on which the order of sale was made, January 15, 1878, a commission was issued to W. W. Moore to take the answers of the same witnesses named in the decree of sale to interrogatories and cross-interrogatories attached to the commission, and the commissioner certified that the witnesses were examined January 16, 1878. It is contended that the date of this commission, and the certificate of the commissioner, show that the evidence on which the court acted had not been taken at the time the decree of sale was made as in chancery proceedings.

Prior to the enactment of section 2114, the failure of the record to show that the evidence was taken by deposition as in chancery cases was regarded an irregularity, which did not affect the validity of the proceedings on collateral attack, and would be so regarded now, if adults only are interested in the estate. But since its enactment, the proceedings are held void, if minors are interested, unless the record shows, expressly or by fair implication, that the evidence was taken by deposition as in chancery proceedings.

Under the statute, it has been held that the duty devolved on the probate court to determine whether the evidence has been so taken, and if the record discloses that the court adjudged that it was so taken, the adjudication, however erroneous, is final and conclusive, and will support the decree of sale, except on error or appeal: *Bland v. Bowie*, 53 Ala. 152. In *Massey v. Smith*, 73 Id. 174, it is said: "By its decree, the court of probate ascertained and declared the depositions were taken as in chancery cases, and that the facts were proved,—the incapability of the lands of a fair and equitable division among the heirs. The decree was final and conclusive upon those matters, when collaterally assailed, and could not be impeached by a reference to the depositions upon which the court proceeded." In that case, it seems that the court adjudged that the depositions were taken as in chancery cases,

and it was sought to impeach the finding by reference to the depositions of record in order to show that, on account of errors and irregularities, they were not so taken, and did not prove the facts which authorized the court to render a decree of sale. In *Bland v. Bowie, supra*, the decree found that the depositions were taken as in chancery cases, but was silent as to what was proved by them. The decree declared that they were filed of record in the proceedings. It was held that such reference to the depositions made them a part of the record, that the decree should be read as if they were incorporated in it by an express recital of their contents, and that the depositions must be looked to in determining whether the necessity of sale was proved. This was in support of the validity of the decree as to a matter in respect to which it was silent. The rule deducible from these decisions is, that when the court, by the recitals of the decree, ascertains the jurisdictional fact, such adjudication is final and conclusive when the decree is collaterally assailed; and if the decree is silent, the jurisdictional fact may appear from other parts of the record.

As the entire record imports absolute verity, the recitals of the decree may be explained, limited, or qualified by other parts of the record. The entire record may be looked to for the purpose of ascertaining the jurisdictional facts, when there is no finding by the court; for jurisdiction is acquired from the facts as they appear in the entire record; but when the power to ascertain the jurisdictional fact is conferred on the court, and the court adjudges that it has jurisdiction, it is not overcome or destroyed because other parts of the record may not be sufficient to uphold such finding: *Bannon v. People*, 1 Brad. App. 496. At must affirmatively appear that such finding cannot be true. The decree of sale positively declares that the depositions of the witnesses were taken upon interrogatories, and were submitted by the petitioner, and ordered to be filed of record. These recitals bring the decree within the rules declared in *Wright v. Ware*, 50 Ala. 549, in which case the depositions were taken under a commission, issued to persons appointed commissioners by a previous order of the court. The decree of sale recited that the commissioner theretofore appointed to take the testimony had returned the same to the court, and that it was opened, read, and ordered of file among the papers in the cause. It was held that it was not essential that the decree should declare in express terms that the depositions were taken as in chancery cases; that the

requirements of the statute are satisfied, if its recitals, fairly interpreted, lead to such conclusions; and that it appeared from the record that the depositions were taken as in chancery cases. It is said: "There are but two modes of taking depositions known to our law,—one in proceedings at common law, and one in proceedings in chancery. The recitals in the record are as consistent with the hypothesis that the depositions were taken as in chancery proceedings as that they were taken as in proceedings at common law. This being true, we must adopt that hypothesis which will support and preserve, not that which will invalidate, the proceedings." On the principle settled in the case last cited, the recitals in the decree of sale, fairly construed, lead to the conclusion that the depositions on which the court acted were taken as in chancery proceedings.

It is unnecessary to decide what would be the effect if other parts of the record contradicted or disproved the findings of the court as recited in the decree, or whether such findings are conclusive when the record itself shows that the evidence of jurisdiction on which the court acted is insufficient to establish the jurisdictional fact. Evidence outside of the record, whether verbal or written, cannot be received to impugn the recitals of the decree. Therefore, whether the depositions and the certificates of the commissioner appearing in the transcript introduced in evidence can be looked to for this purpose depends on the question whether they properly constitute a part of this record; and this fact depends on the question whether they are the depositions referred to in the decree, and ordered to be recorded. If they are, they sustain the recitals of the decree; if they are not, they cannot be looked to for the purpose of disproving its recitals; for if they were not taken until after the rendition of the decree, as the commissioner's certificate imports, and there were no other depositions before the court at the time the decree was made, its recitals are absolutely false. If they are the only depositions taken in the case, on the principle that the record imports absolute verity, it is more consistent and reasonable to indulge the presumption that the commissioner committed an error in his certificate as to the date of the examination of the witnesses. It may be that some of the cases referred to have carried to the utmost extent the interpretation and effect of jurisdictional recitals in the decrees of courts of statutory and limited jurisdiction;

but such construction of the statute has been settled so long, and adhered to, with intervening re-enactments of the statute, that it should be regarded as having become a rule of property, and should not be disturbed. Extending to the recitals of the decree of sale the presumptions which these decisions extend to judicial proceedings when collaterally assailed, we are forced to hold that they satisfy the requirements of the statute that the evidence must be taken by depositions as in chancery proceedings, the entire record not negating or falsifying them. The transcript was properly admitted in evidence, and, in connection with the conveyance made by the administrator to the defendant under an order of the probate court, proves that the plaintiff had been divested of his title.

Affirmed.

JURISDICTION.—The question of jurisdiction must be tried by the whole record, and when it appears therefrom that the court had no jurisdiction over the subject-matter, the judgment is void, and will be so considered when attacked collaterally; but all things required by statute to be done will be presumed to have been done, in absence of proof to the contrary: *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74, and note 79. But judgments are not collaterally attackable for irregularities: *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547, and note 551; *Indiana etc. Ry Co. v. Allen*, 113 Ind. 308; 3 Am. St. Rep. 650, and note 654; *Mitchell v. Allen*, 37 Kan. 33; 1 Am. St. Rep. 231. But the jurisdiction of a court of limited jurisdiction which has rendered a judgment may be collaterally questioned: *People's Savings Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894, and note 896, as to whether the jurisdiction of a probate court may be collaterally questioned, and also as to whether a probate court is a court of limited jurisdiction.

JURISDICTION.—The presumption is, that a court of limited or inferior jurisdiction is without jurisdiction when the jurisdiction does not appear, and the jurisdictional facts are not alleged in a complaint in an action therein: *Gilbert v. York*, 111 N. Y. 544; but the contrary rule is true as to courts of record of general jurisdiction: *English v. Woodman*, 40 Kan. 752; *City of St. Louis v. Lanigan*, 97 Mo. 176; *Hilton v. Buchanan*, 24 Neb. 490.

PROCESS, THE SERVICE OF, HOW PROVED.—The recital in the record by the court that defendants in the proceeding named had been served with process is evidence that they had been so served, and that the court had jurisdiction over their persons: *Brickhouse v. Sutton*, 99 N. C. 103; 6 Am. St. Rep. 497; and it has even been held that such a recital is not only evidence of service, but conclusive evidence of that fact: *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742, and note 765 et seq.; note to *Melia v. Simmons*, 30 Am. Rep. 748-752. But the record recitals in the judgment entry as to the service of the summons are not conclusive where the service found in the rolls is fatally defective: *Blodgett v. Schaffer*, 94 Mo. 652; but see *Adams v. Cowles*, 95 Id. 501; 6 Am. St. Rep. 74, and note 79.

JUDICIAL SALES — PROBATE COURTS.—Proceedings in probate for the sale of a decedent's estate are *in rem*, and cannot be collaterally attacked: *Satcher v. Satcher*, 41 Ala. 26; 91 Am. Dec. 496; but in *Clark v. Thompson*, 47 Ill.

25, 95 Am. Dec. 457, and note, it is held that unless all the steps necessary to bring the parties before the court have been taken in the proper manner, the court acquires no jurisdiction to order a sale. Compare the case of *Lyons v. Hamner*, 84 Ala. 197; 5 Am. St. Rep. 363. And so it has been decided that a purchaser at a probate sale, which is founded upon a petition which does not contain the averments necessary to give the court jurisdiction, acquires no legal title: *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768.

SHARP v. HALL.

[86 ALABAMA, 110.]

CONSTRUCTION OF WRITING — DEED OR WILL. — In arriving at a conclusion as to whether a written instrument, doubtful in its character, but posthumous in its operation, is a deed or a will, the controlling inquiry is the intention of the maker, to be gathered primarily from the language of the instrument itself; but this does not preclude proof of instructions given to a draughtsman as to the nature of the paper he was asked to prepare, nor of all attending circumstances which will aid in determining the maker's intention; and the fact that the paper has never been delivered, and could not operate as a deed, should be considered; for in such doubtful cases, if it could operate as a will, it will be so pronounced.

EVIDENCE. — INTENTION is an inferential act, and, unless announced at the time the act is done, is not susceptible of direct proof.

INCOMPETENT EVIDENCE once admitted may be rebutted by other incompetent evidence.

PROBATE. The instrument in dispute is as follows: "The state of Alabama, Colbert County. These presents show that, in consideration of the love and affection I have to Julia M. Hall, I do now here give and deliver to her the following property, to wit [describing a lot by metes and bounds], together with all the tenements and hereditaments thereunto appertaining, all of which I now hold and possess. But I do hereby reserve the use, control, and consumption of the same to myself for and during my natural life; and this is done in part to do away with all need or necessity of taking out letters of administration after my death. Test my hand and seal this — day of February, 1886." Signed, Mrs. Anne E. Hornsby; attested by J. J. Davis and J. K. Kirk, subscribing witnesses. The sixth instruction asked, and refused, was, that "the fact that Mrs. Hornsby did not dispose of all her property, if it be a fact, must be considered by the jury, with the other evidence, to ascertain whether or not the instrument was intended to be a will." The opinion discloses the other facts.

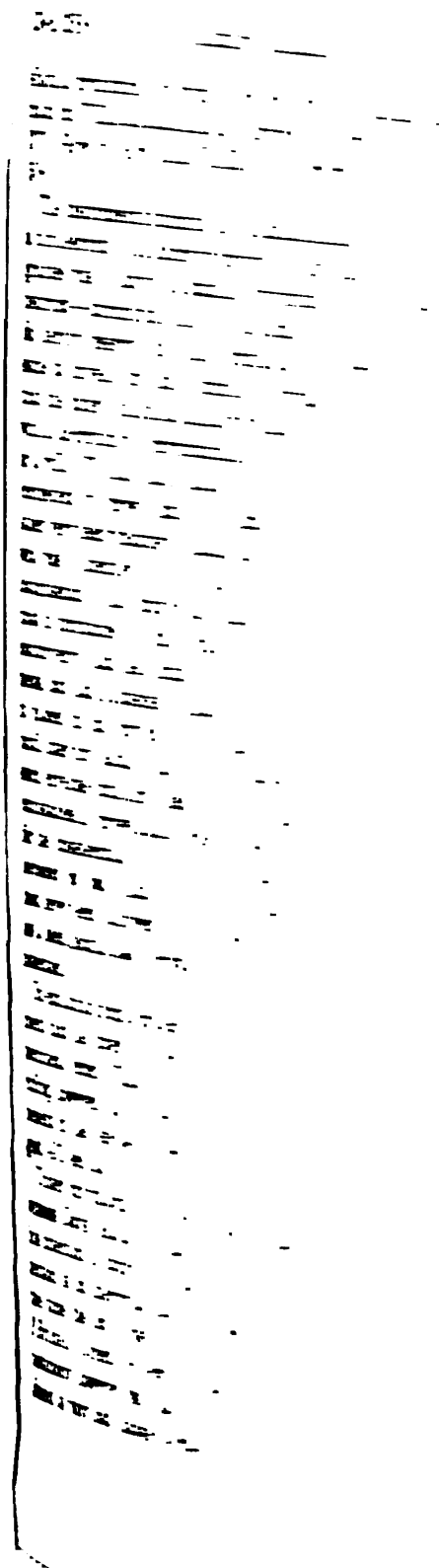
Kirk and Almon, for the appellants.

J. B. Moore, *contra*.

STONE, C. J. There are few, if any, questions less clearly defined in the law-books than an intelligible, uniform test by which to determine when a given paper is a deed, and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death. Out of this has grown one of the tests of testamentary purpose,—namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession, enjoyment, or usufruct on the donee or grantee, during the life of the maker, are always wills, and never deeds, this would seem to be a simple rule, and easy of application. The corollary would also appear to result naturally and necessarily that if the instrument, during the lifetime of the maker, secured to the grantee any actual use, possession, enjoyment, or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule. A declaration of trust, by which the grantor stipulates to hold in trust for himself during life, with remainder to a donee or succession of donees, certainly secures no use, enjoyment, or usufruct to the remainderman during the grantor's life; yet it is a deed, and not a will: 1 *Bigelow's Jarman on Wills*, 17, and notes; *Gillham v. Mustin*, 42 Ala. 365. Can a tangible distinction be drawn between such case and a direct conveyance in form a deed by which A conveys to B, to take effect at the death of A? The human mind is not content with a distinction that rests on no substantial difference. Conveyances reserving a life estate to the grantor have been upheld as deeds: 2 *Devereau on Deeds*, sec. 983; *Robinson v. Schley*, 6 Ga. 515; *Elmore v. Mustin*, 28 Ala. 309; *Hall v. Burkham*, 59 Id. 349. In *Daniel v. Hill*, 52 Id. 480, 486, this court said: "A deed may be so framed that the grantor reserves to himself the use and possession during his life, and on his death creates a remainder in fee in a stranger."

Almost every conceivable form of conveyance, obligation,

by which men attempt to convey, bind, or declare the status of property, have, even in courts of the highest rank, been adjudged to be wills. The form of the instrument is for but little. Whenever the paper contemplates an operation, the inquiry is, What was intended by the maker? *Jarman on Wills*, 20, 25; *Habergham v. Vincent*, 44 Ala. 301; *Daniel v. Hill*, 12 N. H. 257; *Jordan v. Jordan*, 65 Ala. 301; *Daniel v. Hill*, 12 N. H. 257; *Shepherd v. Nabors*, 6 Id. 631; *Kinnebrew v. Kinnebrew*, 638. The intention of the maker is the controlling consideration, and that intention is to be gathered, primarily, from the language of the instrument itself: *Dunn v. Bani*, 104 Ala. 638. The intention cannot be proved by a witness separate from the instrument thereto. But this does not, in cases of instruments such as the present instrument discloses, prevent the consideration of instructions given to the draughtsman of the nature of the paper he was expected to prepare. *Green v. Proude*, 1 Mod. 117, 3 Keb. 310, the paper was characterized as a deed; but the court sustained the directions given to make a will, and a peremptory instruction at that end and purpose, this is a good will." *Spealman* (Bigelow's ed., vol. 1, p. 19) says: "It is to be presumed, to have been influenced by the circumstance that the maker who prepared it was instructed to make a will." *Wright v. Sellers*, 9 Gill & J. 98, the court decided that the paper should have been received of "conversations of the maker made at the time of executing the said paper, and other circumstances, that the said P. S. made the said paper as and for his last will and testament, and that he intended it as such." In this case the controversy was as to whether the paper was a deed or a will. To the same effect, *Witherspoon v. Witherspoon*, 2 McCord, 520. The attending circumstances may be put in proof to determine whether the maker intended the instrument to operate as a deed or a will, whenever it is so framed as to be capable of actual enjoyment under it until the death of the maker. *Gilham v. Mustin*, 42 Ala. 365; *Daniel v. Hill*, 12 N. H. 257; *Wright v. Sellers*, 9 Gill & J. 98; *Jordan v. Jordan*, 65 Ala. 301; *Lee v. Shivers*, 70 Id. 257; *Jarman on Wills*, 25; *Gage v. Gage*, 12 N. H. 257; *Pace*, 14 Ga. 596, 630; *Symmes v. Arnold*, 1 Dana, 257. The proper inquiry is: If a paper cannot have the effect of a deed, but may as a will, then, in doubtful cases,



or writing, by which men attempt to convey, bind, or declare the legal *status* of property, have, even in courts of the highest character, been adjudged to be wills. The form of the instrument stands for but little. Whenever the paper contemplates posthumous operation, the inquiry is, What was intended? 1 Bigelow's Jarman on Wills, 20, 25; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Jordan v. Jordan*, 65 Ala. 301; *Daniel v. Hill*, 52 Id. 430; *Shepherd v. Nabors*, 6 Id. 631; *Kinnebrew v. Kinnebrew*, 85 Id. 638. The intention of the maker is the controlling inquiry; and that intention is to be gathered, primarily, from the language of the instrument itself: *Dunn v. Bank*, 2 Id. 152. The intention cannot be proved by a witness speaking directly thereto. But this does not, in cases of inapt phraseology, — such as the present instrument discloses, — preclude proof of instructions given to the draughtsman in reference to the nature of the paper he was expected to prepare. In *Green v. Proude*, 1 Mod. 117, 8 Keb. 310, the paper had striking characteristics of a deed; but the court said: "Here being directions given to make a will, and a person sent for to that end and purpose, this is a good will." Speaking of this case, Jarman (Bigelow's ed., vol. 1, p. 19) says: "The court seems to have been influenced by the circumstance that the person who prepared it was instructed to make a will."

In *Wareham v. Sellers*, 9 Gill & J. 98, the court decided that testimony should have been received of "conversations of the deceased, made at the time of executing the said paper, and from the other circumstances, that the said P. S. made and executed the said paper as and for his last will and testament, and intended it as such." In this case the controversy was whether the paper was a deed or a will. To the same effect is *Witherspoon v. Witherspoon*, 2 McCord, 520.

So all the attending circumstances may be put in proof as aids in determining whether the maker intended the paper should operate as a deed or a will, whenever it is so framed as to postpone actual enjoyment under it until the death of the maker: *Gilham v. Mustin*, 42 Ala. 365; *Daniel v. Hill*, 52 Id. 430; *Campbell v. Gilbert*, 57 Id. 569; *Jordan v. Jordan*, 65 Id. 301; *Rice v. Rice*, 68 Id. 216; *Lee v. Shivers*, 70 Id. 288; 1 Bigelow's Jarman on Wills, 25; *Gage v. Gage*, 12 N. H. 371; *Mealing v. Pace*, 14 Ga. 596, 630; *Symmes v. Arnold*, 10 Id. 506; *Jackson v. Jackson*, 6 Dana, 257.

Another pertinent inquiry: If a paper cannot have operation as a deed, but may as a will, then, in doubtful cases, we

should pronounce it a will, *ut res magis valeat*: Bigelow's Jarman on Wills, 21, 22, 24, 25; *Attorney-General v. Jones*, 3 Price, 379; *Gage v. Gage*, 12 N. H. 371; *Symmes v. Arnold*, 10 Ga. 506.

The instrument sought to be established as a will is in form a nondescript. It clearly shows on its face that the donee or grantee was to have no actual enjoyment of the property—no usufruct—during the life of the maker. Its language is: "I do hereby reserve the use, control, and consumption of the same to myself for and during my natural life." We hold that the paper, on its face, falls within the indeterminate class, which, according to circumstances, may be pronounced a deed or a will. We also hold that, on the trial of the issue, it was competent to prove that the maker was without lineal or other very near relatives; that she was attached to the donee, who was a member of her household; that she sent for the draftsman of the paper and employed him to write her will; that in pursuance of such employment, he wrote the paper in controversy; that she signed it with a knowledge of its contents, and had it attested; that she did not deliver it, but had it placed in an envelope, and indorsed, "Not to be opened until after my death," and that she carefully preserved it in such envelope until her death. Now, all these facts and circumstances, if proved and believed, were competent and proper for the consideration of the jury in determining the issue of *deviavit vel non*. And the fact, if believed, that the paper had never been delivered, and therefore could not take effect as a deed, should also be considered in arriving at the maker's intention.

In excluding from contestant's exceptive allegation the averment that the paper is a deed, the probate court committed a technical error. That was the real issue in the case. This ruling, however, did the contestants no injury, as they had the benefit of the defense it sought to interpose: 3 Brickell's Digest, 405, sec. 20.

Under our rulings, if the question were properly raised, the witness Davis should not have been permitted to testify that his intention in framing the paper was to make it a will. Intention is an inferential fact, and, unless it is announced at the time the act is done, it is not susceptible of direct proof: 3 Brickell's Digest, 438, secs. 479 et seq. The objection to this testimony however was, that it was "parol evidence introduced to vary and change a written instrument." There was

nothing in this objection, and it was rightly overruled: 3 Id. 444, sec. 574.

We have shown that the opinion of the witness Davis that the paper was a will, or that he intended it for a will, was illegal evidence, if properly objected to. Being admitted, however, it was competent to rebut it. It was attempted to be rebutted in this case, not by disproof of the fact, but by testimony tending and intended to discredit the witness. A letter proved to have been written by him, and which stated that Mrs. Hornsby had died intestate, was, after laying the proper predicate, offered for this purpose. This letter, it was contended, contained a prior contradictory statement by the witness to that part of his testimony in which he had said the paper was intended as a will. Offered as it was, it should have been received: 1 Brickell's Digest, 889, sec. 1225. In the absence of proof by Davis that he intended the paper for a will, the letter would have been illegal evidence: 2 Id. 549, sec. 126; 3 Id. 828, sec. 101.

The paper over which the present contention arose contains the following clause: "And this [the execution of the paper] is done, in part, to do away with all need or necessity of taking out letters of administration after my death." This clause is a circumstance which the jury may look at and consider, in determining whether Mrs. Hornsby intended that Julia M. Hall should take or enjoy any interest during the former's life. It is not conclusive, but must be weighed with the other evidence. It would probably be more weighty if it made provision for Mrs. Hornsby's entire estate. Attempts—fruitless, of course,—are sometimes made to dispense with administration, even in documents that are unmistakably testamentary.

Charge No. 6, asked by contestants, should have been given. The remaining charges asked by them were, in the light of the evidence, calculated to confuse or mislead, and were rightly refused on that account.

We have now considered all the questions we deem necessary. In a very few of the many rulings the probate court erred.

Reversed and remanded.

INSTRUMENT OF WRITING, WHETHER A DEED OR A WILL.—If it appears doubtful from the face of an instrument whether the person executing it intended it to operate as a deed or a will, it is proper to ascertain the intention of such person, not only from its contents, but also from evidence

showing how such person really considered it: *Robertson v. Dunn*, 2 Murph. 133; 5 Am. Dec. 525. An instrument in the form of a deed is a will, where the property that it purports to convey is an undivided interest in that of which the grantor shall die seized: *Watkins v. Dean*, 10 Yerg. 320; 31 Am. Rep. 563, and note. An instrument passing property during the donor's lifetime, although of alleged testamentary character, being not absolutely a will, must be a deed, for there is no middle ground: *Hileman v. Bouslaugh*, 13 Pa. St. 344; 53 Am. Dec. 474. An instrument may be partly a deed and partly testamentary: *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376, and note. An instrument may be a will, though in the form of a deed, if it is revocable at pleasure, not to take effect until the death of the maker, properly attested, and otherwise regular in form: *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751.

DEFINITION BETWEEN DEEDS AND WILLS: See monographic note to *Burlington University v. Barrett*, 92 Am. Dec. 383-389. Whether a paper is a deed or a will is a question of intention; if it appears that the maker did not intend any interest whatever to vest before his death, then the law regards the instrument as a will: *Simon v. Wildt*, 84 Ky. 157.

MURRAY, DIBRELL, AND COMPANY v. McNEALY AND CURETON.

[36 ALABAMA, 284.]

CHattel Mortgage GIVEN TO SECURE the payment of a *bona fide* debt, and authorizing the mortgagor to retain possession and continue the sale of the goods exclusively for the benefit of the mortgagee, paying the proceeds of sales to him each week, or oftener if required, is not fraudulent on its face, but is valid as against creditors, and makes the mortgagor the agent of the mortgagee to sell and account to him.

W. A. Scott, for the appellants.

J. F. Roper, *contra*.

SOMERVILLE, J. The point chiefly discussed, both at the bar and in the briefs of counsel, is the validity of the mortgage executed by the defendants, McNealy and Cureton, to Davis and Son, on November 18, 1887, transferring to the mortgagees a stock of merchandise then in the possession of the mortgagors, for the purpose of securing a debt described in the instrument. As to the *bona fides* of this debt there is no serious controversy. Nor is any actual fraud established by the testimony which can in any way vitiate the transfer of the goods. It is contended that the mortgage is rendered fraudulent on its face by the provision contained in it authorizing the mortgagees, McNealy and Cureton, to continue the sale of the goods, although it is expressly stipulated that such sale shall be exclusively for the benefit of the mortgagees. It

is provided that "all moneys arising from the sales of said goods" shall, *eo instanti*, be the property of the mortgagees, and shall be paid over to them at the end of each week, or oftener if required, and shall go as credits on the mortgage debt, the mortgagors expressly agreeing that all such sales "shall be for and on account" of said mortgagees. If any of the goods are sold on a credit, the accounts are also to pass to the mortgagees as their property, and be credited as so many payments on the mortgage debt.

The law day is fixed on February 1, 1888, the day the secured debt fell due.

There is no clause anywhere contained in the mortgage which can be construed, expressly or by implication, as evincing an intention to permit the mortgagors to reserve any benefit to themselves, or any power of disposition over the goods inconsistent with the idea that the property is not to be held strictly subject to the lien of the mortgage as a *bona fide* security for the debt.

In *Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429, we discussed at length the subject of mortgages on stocks of merchandise, where the mortgagor was permitted to remain in possession, and to sell the goods in due course of trade for his own benefit. We held that such a power, accompanied with continued possession, conferred on the mortgagor a dominion over the property which was utterly inconsistent with and subversive of the mortgage lien, rendering the mortgage itself virtually a conveyance "made in trust for the use of the person making it," and stamping it with invalidity for fraud, as tending inevitably to hinder and delay the creditors of the mortgagor.

Anticipating such a case as that now before us, we then said: "We are not to be understood as intimating in this opinion that a mortgage of merchandise would be rendered conclusively invalid, where the mortgagor is in good faith left in possession of the goods with power to sell for the exclusive use of the mortgagee, holding the proceeds of sale for his benefit. In such a case, he may well be deemed the mere agent of the mortgagee, acting for him and in his behalf." In *Robinson v. Elliott*, 22 Wall. 513, 524, where the subject is elaborately discussed by the supreme court of the United States, it was observed by Mr. Justice Davis that the court was not prepared to say that a mortgage would not be sustained "which allows a stock of goods to be retained by the mort-

gator, and sold by him at retail, for the express purpose of applying the proceeds to the payment of the mortgage debt. . . . Indeed, it would seem," he observed, "that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors." The mortgage, in that case, was held fraudulent and void, on the same ground stated by us in *Benedict v. Renfro*, *supra*, that the mortgagors were permitted to deal with the property as their own, without covenant to account with the mortgagees for the proceeds of sale, and without recognition that the property was sold for their benefit.

The principle controlling this case is not distinguishable from that decided in *Perry Ins. Co. v. Foster*, 58 Ala. 502; 29 Am. Rep. 779. There, an assignment was made conveying to a preferred creditor, in the early part of the year, a plantation, and the crops to be raised during the year, and the personal property used in cultivating them. It was stipulated that the property should remain in the possession of the grantors, to be used by them in making the crops, which were to be delivered to the grantee as soon as made and gathered, the proceeds to be applied to the payment of the secured debts. No actual fraud being shown, the assignment was sustained, on the ground that it was contemplated that the whole property was to be devoted to the satisfaction of the mortgage debt, without the reservation of any benefit to the grantor. Said Brickell, C. J.: "If the crops to be produced are, with the existing property, to be devoted to the payment of the secured debts, it has not been supposed such a stipulation is a reservation of a benefit to the debtor, though thereby the *residuum* which must revert to him may be increased. It is not unusual in assignments to provide that the assignees, or the debtor under their direction, may continue the business; and if it appears this is done, not for the benefit of the debtor and to the prejudice of the unsecured creditors, but to promote the interest of the creditors who are preferred, they are sustained." Many cases are cited illustrative of the principle involved, and sustaining the conclusion reached by the court.

The precise question here involved has been many times considered by the New York court of appeals. It arose in *Conkling v. Shelly*, 28 N. Y. 360, 48 Am. Dec. 348, where the court sustained such a mortgage of a stock of merchandise as valid, — it being declared to be neither unlawful nor fraudulent *per se*. It was said: "Such an agreement made the

mortgagors agents of the mortgagees. Their possession and their sales were in effect those of the mortgagees. It was as if the latter had taken possession and placed a third person in charge as agent to sell and account to them. They could not have escaped from crediting on their indebtedness the proceeds of sales made by such an agent because he had fraudulently or dishonestly misapplied or employed the money." A like conclusion was reached in *Ford v. William*, 24 N. Y. 359; and *Miller v. Lockwood*, 32 Id. 298. The question again came up before the same court in *Brackett v. Harvey*, 91 Id. 215, decided as late as 1883; and the doctrine declared in these cases was reaffirmed without dissent by any member of the court. It was said by Finch, J.: "These cases went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish. It devotes, as it should, the mortgage property to the payment of the mortgage debt."

The controlling principle of the cases is, that the mortgagee is not prohibited by any rule of law or of public policy from employing the mortgagor as his agent to sell the goods on his (the mortgagee's) exclusive account, without authority to use or appropriate the proceeds of sale to any other purpose than paying the mortgage debt. A like principle has been recognized by the English courts, where trustees, under general assignments made for the benefit of creditors, have been permitted to stipulate for the employment of the debtor as their agent to dispose of the goods: *Janes v. Whitbread*, 5 Eng. L. & Eq. 431.

The New York doctrine seems to us to be sound in principle, and it has been followed in Virginia, New Hampshire, Illinois, Connecticut, Wisconsin, Ohio, and other states, and in the circuit courts of the United States: *Marks v. Hill*, 15 Gratt. 400; *Wilson v. Sullivan*, 58 N. H. 260; *Goodheart v. Johnson*, 88 Ill. 58; *Kendall v. Carpet Co.*, 13 Conn. 383; *Fisk v. Harshaw*, 45 Wis. 665; *Kleine v. Katzenberger*, 20 Ohio St. 110; 5 Am. Rep. 630; *Hawkins v. Bank*, 1 Dill. 462; *Overman v. Quick*, 8 Biss. 134; *Pierce on Fraudulent Mortgages of Merchandise*, secs. 139, 43-49.

The mortgage is not void on its face, and there is nothing

in the testimony which proves that it was intended otherwise than as a *bona fide* and fair appropriation of the debtor's property to secure a debt honestly due, without reservation of benefit to the grantors: *Gazzam v. Poyntz*, 4 Ala. 374; 37 Am. Dec. 745. The deed of assignment made January 25, 1888, by which McNealy and Cureton, the mortgagors, reaffirmed their assent to the mortgage of November 18, 1887, need not be noticed, as it exerts no influence on the question in hand.

The decree of the chancellor correctly pronounces the mortgage free from all fraudulent intent, and legally valid, and is affirmed.

CHATTEL MORTGAGES. — A chattel mortgage of a stock of goods is not void, as a matter of law, as to the creditors of the mortgagor, but the question of good faith ought to be submitted to the jury, where the mortgage contains a provision that the mortgagor shall remain in possession of the property and sell the same in the course of trade, etc.: *Whitson v. Griffe*, 39 Kan. 211; 7 Am. St. Rep. 546, and note 550.

LUNSFORD v. DIETRICH.

[86 ALABAMA, 350.]

PLEADING AND PRACTICE — PROOF OF RECORD. — The original papers and docket in criminal proceedings before a justice of the peace are not self-proving, and to be admissible in an action for malicious prosecution, they must be identified and authenticated either by sworn copy or by the certificate of the magistrate.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — In support of the issue of probable cause *vel non*, in an action for malicious prosecution for larceny, the plaintiff may prove that the property alleged to have been stolen was his, and the prosecutor's knowledge of the fact.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — An architect who has been prosecuted for the larceny of the drawings of a building by the builder, and acquitted, and who sues the builder for malicious prosecution, may prove, upon the issue of probable cause *vel non*, — a universal custom, — that such drawings remain the property of the architect, and that the builder is only entitled to the use of them during the time of construction, to be returned when the building is completed; and also that such builder had erected buildings by plans and specifications drawn by architects, in order to trace knowledge of such custom to him.

CRIMINAL LAW — LARCENY. — Where, under a custom, a builder is entitled to the use and possession of the drawings of a building while it is in course of construction, he has a special property therein, which may be the subject of larceny by the architect who is the general owner, but who fraudulently and clandestinely takes them from the possession of the builder, with felonious intent to convert them to his own use, or deprive the builder of their possession.

CRIMINAL LAW—TRESPASS—LARCENY.—One who, having the general ownership of personal property, wrongfully takes it from another who has the possession and a special property therein is a trespasser; but if he takes it openly, in the presence of the party having possession, or of other persons known to him, he is not guilty of larceny, but of mere civil tort.

MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE.—To maintain malicious prosecution, malice and want of probable cause must occur; and though malice may be inferred from want of probable cause, still such inference may be rebutted by proof that the prosecutor, though not able to show probable cause, instituted the prosecution under an honest belief of plaintiff's guilt; provided such belief was founded on facts and circumstances sufficient to produce in the mind of a prudent and reasonable man such belief of plaintiff's guilt as to repel the idea that the prosecutor was actuated by malice.

MALICIOUS PROSECUTION—DAMAGES.—In malicious prosecution for larceny, the court may instruct the jury that plaintiff, if entitled to recover at all, can recover such actual damage as naturally and proximately followed the arrest, as physical suffering and wounded pride; but that a witness could not testify to the particular amount of such damage,—that to be determined by the particular circumstances of the case.

Ward and Head, for the appellant.

CLOPTON, J. Appellant instituted a criminal prosecution against appellee by causing a warrant for his arrest to be issued by a justice of the peace, on the charge of larceny of the drawings for a building. The criminal proceedings having been terminated, and appellee discharged, he brings this action for malicious prosecution. For the purpose of proving that the prosecution was instituted by the defendant, and its termination, the original affidavit made by him, the warrant of arrest, and the docket of the justice were introduced in evidence, against the objection of the defendant. The ground of objection is, that the original papers and docket are not self-proving instruments, and should be authenticated by the certificate of the magistrate. It may be conceded that the original papers and docket are not self-proving, and must be sustained by proof of identity. The docket was identified, and that such proof in respect to the affidavit and warrant was made is presumable from the bill of exceptions, especially as the want of proof of identity is not specified as a ground of objection. Section 3319 of the Code of 1886, which makes a statement of any judgment rendered by a justice of the peace, made and certified by him, or by his successor in possession of his docket, presumptive evidence of the fact, has been construed as having reference only to judgments in civil cases. In the

absence of a statute, a certified transcript of the papers and judgment of a court not a court of record is not legal evidence. The proceedings in such courts must be proved by the production of the original papers and docket, accompanied by proper proof of identity and verity, or by sworn copies. Also, in civil causes, section 3319 is merely cumulative, and does not abrogate the former mode of proof: *Burns v. Campbell*, 71 Ala. 271; *Blackman v. Dowling*, 57 Id. 78.

In support of the issue of probable cause *vel non*, it was competent for the plaintiff to prove that the property of the drawings was in him; for it is an essential element of larceny that the goods taken belong to some person other than the taker. For this purpose, it was permissible for the plaintiff to prove a universal custom that the drawings for a structure remain the property of the architect, and that the builder is only entitled to the use of them during the time of the construction, to be returned when the building is completed; and also that the defendant had erected buildings by plans and specifications drawn by architects, in order to trace knowledge of the custom to him. But though the plaintiff may have been the general owner of the drawings, the defendant might also have had a special property in them, and the plaintiff be guilty of larceny if he fraudulently and clandestinely took them from the possession of the defendant with a felonious intent to convert them to his own use, or to deprive defendant of his ownership. Under the custom, as proved by plaintiff, the defendant was entitled to the use and possession of the drawings during the time the building was in course of construction, and this vested in him a special property.

Larceny ordinarily includes a trespass. Every direct and forcible invasion of another's right which causes injury to his possession,—any interference with the goods of another, by taking them from the possession of the owner without his consent, and without excuse or justification,—is a trespass. An interference by the general owner with goods in the possession of one who has a special property and right of possession is an injury to such possession; and having the general property is not an excuse or justification. A bailor may commit a trespass by taking goods from the possession of his bailee. A landlord may wrongfully invade the possession of his tenant. If, after an unconditional delivery of the drawings by the architect to the defendant, under the contract of employment, the plaintiff, before the completion of the build-

ing, and while they were in the possession of the defendant, took and carried them away without his consent, he thereby committed a trespass, and the court should have so instructed the jury at the request of the defendant.

The plaintiff, however, may have been a trespasser, and yet not have committed the offense of larceny. To constitute the offense, the wrongful act must be secret or fraudulent, and done with felonious intent to convert the property to the taker's own use, or to deprive the owner of his property. If done openly, in the presence of the owner, or of other persons known to him, the taking and carrying away of the drawings is a mere civil tort: *Johnson v. State*, 73 Ala. 523.

To maintain an action for a malicious prosecution, two essential elements must occur, — malice, and a want of probable cause. The inference of malice may be drawn from a want of probable cause; but such inference is subject to be rebutted by proof that the prosecutor, though not able to show probable cause, instituted the prosecution under an honest belief that the plaintiff was guilty of the offense charged; provided such belief is founded on facts and circumstances which would produce in the mind of a reasonable and prudent man such serious suspicion of the plaintiff's guilt as to repel the idea that the prosecutor was actuated by malice. Such is the settled rule: *Long v. Rodgers*, 19 Ala. 326; *Ewing v. Sanford*, 21 Id. 157; *McLeod v. McLeod*, 73 Id. 42.

We discover no error in the charge of the court relating to the measure of damages.

Reversed and remanded.

MALICIOUS PROSECUTION — PROBABLE CAUSE: See *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note.

RECORDS. — The custodian of judicial records, in giving copies, need set them out only as the originals appear, and so certify; and the failure to certify that an affidavit contained therein was made by the party who on the face of the copy appears to have made it is unimportant: *Ward v. Sestor*, 70 Tex. 343; 8 Am. St. Rep. 606, and note 608.

WITHERINGTON & Co. v. MASON.

[28 ALABAMA, 245.]

HOMESTEAD — MORTGAGE — REFORMATION. — A homestead mortgage executed by husband and wife in conformity with the Alabama statute (Code, section 2822) may be reformed in equity for mistake in describing one of the subdivisions of land, if the quantity of land conveyed is not thereby increased.

MORTGAGE — FUTURE ADVANCES — PAYMENT. — When a mortgage is executed to secure an existing debt, and does not contemplate or provide for future advances, any money realized from the mortgaged property must be applied to the payment of the debt secured.

MORTGAGE — APPLICATION OF PAYMENTS. — Where a mortgage conveys different parcels of the same kind, or different classes of property, the mortgagee may, in the absence of a stipulation to the contrary, elect for his own benefit the particular property to which he will resort in the first instance, and in the absence of some peculiar equity growing out of other circumstances, the mortgagor, or any person claiming under him, cannot compel the mortgagee to exhaust any one of the different parcels or classes of property conveyed by the mortgage to the exclusion of the other.

HOMESTEAD — MORTGAGE — APPLICATION OF PAYMENTS. — Where the wife voluntarily signs and assents to a mortgage of the homestead and other personal property by the husband to secure advances, the homestead loses its character as against the mortgagee, and becomes subject to all his rights and remedies, and the wife has no right to insist that the personal property be first sold and applied in relief of the homestead, especially when the husband has secured additional advances on an agreement that the proceeds of the sale of the personal property should be first applied to the payment of such additional advances.

HOMESTEAD — MORTGAGE — RIGHT OF WIFE. — By signing and assenting voluntarily to a mortgage of the homestead and other personal property as required by statute, the wife does not pledge her property for the payment of the secured debt; nor does she occupy the position of a surety so as to invoke the power of a court of equity to compel a mortgagee to exhaust one of the several pieces of property before resorting to the others.

Stallworth and Burnett, for the appellants.

CLOPSON, J. On January 5, 1886, appellees, who are husband and wife, executed a mortgage on real and personal property to secure a note for \$175, made by the husband to appellants, payable on the first day of October of the same year. A portion of the personal property and the real estate, which constituted the homestead of the mortgagor, was sold under a power of sale contained in the mortgage. On discovering a mistake in the description of one of the subdivisions of the land, the sale was disregarded; and the bill is filed by appellants to reform the mortgage, and for a foreclosure. The mortgage was executed and acknowledged in conformity with

the statutory requirements to constitute a valid alienation of the homestead. The mistake is admitted in the answer, and also proved. In such case, though the subdivision, in the description of which the mistake occurs, is a part of the homestead, a court of equity will interpose to reform the mortgage, if it is executed by the husband and wife in conformity with the statute, and the reformation does not increase the quantity of land conveyed: *Gardner v. Moore*, 75 Ala. 394; 51 Am. Rep. 454. Having reformed the mortgage, the court will proceed to a foreclosure.

The proceeds of the personal property sold under the power should unquestionably be applied to the mortgage debt. The material question arises on the application of the proceeds of three bales of cotton which were delivered by the mortgagor to the mortgagees, and sold by them in the fall of 1886. In stating the account on the reference ordered, the register applied the proceeds of the cotton to an open account for advances which was not covered by the mortgage. The chancellor corrected the report of the register, and applied the proceeds in reduction of the mortgage debt. The mortgage included the entire crops made by the mortgagor during 1886. The application by the register was evidently based on his finding, as matter of fact, that in May of that year an arrangement was made by which the mortgagees agreed to make further advances to the mortgagor; and he agreed, in consideration thereof, that such advances should be paid for out of the first cotton delivered. The preponderance of the evidence sustains the conclusion of the register. The chancellor did not pass on this finding, regarding it, in his view of the case, as immaterial. The question presented for consideration is, Can a mortgagor who is a married man, when the mortgage conveys the homestead and personal property, agree, without the consent of his wife, to apply the personal property to any debt other than the mortgage debt?

The general rule may be conceded, that when a mortgage is made by a debtor as security for an existing debt, and it does not contemplate or provide for future advances, moneys realized from the mortgaged property must be applied to the payment of the debt secured thereby. They may, however, be otherwise applied by agreement of the mortgagor, no rights of third persons intervening: *Schiffer v. Feagin*, 51 Ala. 335; *Lervystein and Simon v. Whitman*, 59 Id. 345. On the assumption that an agreement was made as found by the register,

the question is, Has Mrs. Mason, the wife of the mortgagor, any legal right in the homestead which will be prejudiced by the appropriation of the cotton to the payment of the future advances? or any equity superior to the equity of the mortgagees to have such appropriation made? Where a mortgage conveys different parcels of the same kind, or different classes of property, the mortgagee may, in the absence of a stipulation to the contrary, elect for his own benefit the particular property to which he will resort in the first instance. In the absence of some peculiar equity growing out of other circumstances, the mortgagor, or any person claiming under him, cannot compel the mortgagee to exhaust any one of the different parcels or classes of property conveyed by the mortgage to the exclusion of the other.

By the voluntary signature and assent of the wife to a mortgage of the homestead, the waiver of the right of exemption is in favor of the mortgagee, and all the right and title of the husband to the homestead passes to him equally with other property not exempted and included therein. Though a judgment creditor cannot compel a mortgagee whose mortgage includes the homestead and other property of the debtor to exhaust the homestead before resorting to such other property, and thus deprive the debtor of his homestead exemption as against the judgment, the mortgagee may, by his own volition, and for his own benefit, resort in the first instance to the homestead; and the mortgagor himself cannot compel the mortgagee to exhaust the other property before resorting to the homestead. The mortgagee may release the other property, and retain his lien on the homestead. In *Chapman v. Lester*, 12 Kan. 592, the mortgage conveyed the homestead and other realty. The mortgagee released a large portion of the last to an assignee in bankruptcy, and then filed a bill to foreclose the mortgage. It was claimed in defense of the suit that the mortgage was satisfied and discharged, on the ground that it was the mortgagee's duty to exhaust the other property before proceeding against the homestead. Brewer, J., says: "We cannot assent to the claim as thus broadly stated. It means that when a creditor takes a mortgage on the homestead and other property, though nothing is expressed, there is an implied agreement to consider the homestead as a sort of secondary security,—a security for security; that the other property mortgaged is the primary security; and that if that proves insufficient, and only when that proves insufficient,

can the lien on the homestead be enforced. But in the absence of legislation and of express contract, we do not think the courts are warranted in interpolating such a stipulation. The creditor takes such security for his debt, and with such contract as the parties may agree upon. As between the parties, and without other intervening rights, and in the absence of express stipulation, the mortgagee may release any portion of the mortgaged property without impairing his lien upon the remainder."

The homestead right is of constitutional or statutory creation, and its nature, character, and extent depend on the law creating and defining it. The exemption is a personal right conferred on the debtor, the benefit and enjoyment of which inures to his family through and by the exemption in his favor. The right and estate of homestead are in the husband, in whom the title to the property resides. Neither the constitution nor the statute confers on the wife any right or estate in the homestead during his life, but a mere power to prevent its alienation. She may occupy and enjoy it with her husband by his permission, but he has the right to abandon it at pleasure. When she voluntarily signs and assents to a mortgage of the homestead by the husband in the manner required by the statute, it loses its character of homestead as against the mortgagee, and becomes subject to all his rights and remedies. The homestead is not secondarily liable: *Vancleave v. Wilson*, 73 Ala. 387; *Seaman v. Nolen*, 68 Id. 463.

Creditors or encumbrancers or sureties may invoke the power of a court of equity to compel a mortgagee to exhaust one of several pieces of property. By signing and assenting to a mortgage of the homestead, the wife does not pledge her property for the payment of the secured debt, nor does she occupy the position of a surety. In this respect, this case is distinguishable from *Askew v. Steiner*, 76 Ala. 218, where we held that a mortgagee cannot appropriate, with the consent of one only of two joint mortgagors, the property or the proceeds to the payment of another debt, and that such appropriation operates a satisfaction *pro tanto*, so far as the rights of the other mortgagor are concerned. In that case, both mortgagors were bound for the mortgage debt. As the husband, to whom the homestead belonged, and in whose favor the exemption is created, has no right to compel the mortgagee to exhaust property other than the homestead before resorting to the latter, *a fortiori* the wife who derives the

benefit of the homestead exemption only through the right of her husband, has no such right. She may have signed and assented to the mortgage because of her belief that the other property conveyed would be sufficient to satisfy the mortgage, and in the confidence that the mortgagee would exhaust it, and leave the homestead intact. But without such stipulation in the mortgage, the mortgagee is under no enforceable obligation to do so. He may, by agreement of the husband, appropriate the other mortgage property to the payment of unsecured debts, which the wife is without power to prevent: *Brown v. Cozard*, 68 Ill. 178; *Searle v. Chapman*, 121 Mass. 19; *White v. Polleys*, 20 Wis. 503; 91 Am. Dec. 432; 2 Jones on Mortgages, sec. 632. The proceeds of the cotton delivered to and sold by complainants should, under the agreement, be applied to the payment of the future advances.

As the decree must be reversed, and the cause remanded, it is proper to call attention to the fact that Mrs. Mason did not answer the bill, nor was a decree *pro confesso* taken against her.

Reversed and remanded.

REFORMATION OF INSTRUMENTS. — Equity will reform written instruments for mistake, if the rights of strangers are not prejudiced thereby: *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232; *Anderson v. Tydings*, 8 Md. 427; 63 Am. Dec. 708. But a written instrument will not be reformed, even in equity, where no fraud or mutual mistake is alleged and proved: *Story v. Coager*, 36 N. Y. 673; 93 Am. Dec. 546; *McEldery v. Shipley*, 2 Md. 25; 56 Am. Dec. 703. Nor will equity reform a written instrument for a mistake of law, where no mistake of fact exists: *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 333; though equity will sometimes relieve against a mistake of law in drawing an instrument, so as to make such instrument conform to the manifest intention of the parties: *Hoarts v. Strode*, 11 Ohio, 480; 38 Am. Dec. 744; compare *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816, and note; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63, and note.

HOMESTEAD — RIGHT TO ALIENATE OR ENCUMBER. — In the absence of a constitutional or statutory prohibition, as incident to the right of ownership, the owner of a homestead may sell or encumber it, with like effect as if the property had not been set apart as a homestead: *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66, and note; *Ketchin v. McCarley*, 26 S. C. 1; 4 Am. St. Rep. 674. A homestead may be mortgaged, and one who purchases the premises subject to and agreeing to pay such mortgage cannot avoid it: *Skinner v. Reynick*, 10 Neb. 323; 35 Am. Rep. 479; *Kirkaldie v. Larrabee*, 31 Cal. 455; 89 Am. Dec. 205; but the wife must concur and join with the husband in the alienation or mortgage of the homestead: *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767; *Pitcher v. Atchison etc. R. R. Co.*, 38 Kan. 516; 5 Am. St. Rep. 770, and note 777; *Brewer v. Wall*, 23 Tex. 585; 76 Am. Dec. 76; *Larson v. Reynolds*, 13 Iowa, 579; 81 Am. Dec. 444; *Burnap v. Cook*, 16 Iowa, 149; 85 Am. Dec. 507; *Sharp v. Bailey*, 14 Iowa, 387; 81 Am. Dec. 489.

can the lien on the homestead of legislation and the courts are warranted. The creditor takes such contract as the parties make, and without other than of express stipulation, that of the mortgaged property remainder."

The homestead right is a creation, and its nature, character, and defining it. It is conferred on the debtor, and inures to his family to the advantage. The right and estate in whom the title to the homestead nor the statute of limitation in the homestead during its alienation. She may alienate by his permission, and pleasure. When she conveys the homestead by the statute, it loses the mortgage, and becomes a lien. The homestead is a lien. *Wilson, 73 Ala. 387; 8*

Creditors or encumbrancers have no power of a court of equity to divide one of several pieces of property into a mortgage of the property for the payment of a debt, or to occupy the position of a mortgage, distinguishable from a mortgage. It is held that a mortgage of one only of two pieces of property proceeds to the payment of a debt, and appropriation operates as a lien on the other mortgage. The mortgage of the other mortgage was held to be a lien, to whom the exemption is conferred, and the mortgagee to exhaust the property, resorting to the last

benefit of the homestead ~~and~~ ^{use}, and Watts and Son, for the ap-
 her husband, has no ~~and~~ ^{and}
 assented to the mortgage ~~and~~ ^{and}, contra.
 property conveyed with ~~and~~ ^{and}

and in the confidence ~~and~~ ^{and} was finally decided on demurrer to
 and leave the homestead ~~and~~ ^{and} a demurrer is an admission of the truth
 in the mortgage, the ~~and~~ ^{and} which is sufficiently averred, and it
 gation to do so. *Bank v. Security Loan Ass'n*, 72 Ala. 207;
 appropriate the other ~~and~~ ^{and} Id. 627; *Street Railway Co. v. Rand*, 83
 unsecured debts, with ~~and~~ ^{and}

Brown v. Cozard, 68 ~~and~~ ^{and} of the present bill is to enjoin a suit at
White v. Polley, 25 ~~and~~ ^{and} of a tract of land, instituted by Mrs. Pip-
 Mortgages, sec. 632 ~~and~~ ^{and} If the averments of the bill be true, Mrs.
 and sold by ~~and~~ ^{and} suit is founded on an alleged inheritance
 applied to the ~~and~~ ^{and} and the mother's title rests on a deed to the

As the decree ~~and~~ ^{and} said David Manning directly to her, at a
 is proper to call ~~and~~ ^{and} of husband and wife subsisted between
 answer the bill, ~~and~~ ^{and} as this suit was, in July, 1886, the deed

Reversed and ~~and~~ ^{and} directly to the wife did not vest a legal title
 consequence, the action of ejectment founded

REFORMATION ~~and~~ ^{and} should not be maintained: *McMillan v. Peacock*, 57
 for mistake, *if the* ~~and~~ ^{and} *metag v. Frank*, 61 Id. 67; *Warren v. Jones*, 68
Jordan, 13 Miss. ~~and~~ ^{and} *McLeod*, 76 Id. 101; *Maxwell v. Grace*, 85 Id.

Am. Dec. 708. ~~and~~ ^{and} equity, where ~~and~~ ^{and} had been brought after February 28, 1887, when
 Am. Dec. 701. ~~and~~ ^{and} defining the rights of married women was ap-
 of law, where ~~and~~ ^{and} action could have been maintained on the title
 Am. Dec. 701. ~~and~~ ^{and} *Maxwell v. Grace*, *supra*.

law in drawing ~~and~~ ^{and} bill avers that the complainant, Manning, inter-
 the marriage ~~and~~ ^{and} with Mrs. Atkinson in 1868; that she had, at the
 time, ~~and~~ ^{and} marriage, two minor or infant children; and that

He ~~and~~ ^{and} now a married woman, is one of them. The other, a
 since died, leaving a widow and two infant children.

He ~~and~~ ^{and} further avers that, in 1871, he, the said David, made
 his wife a deed to said lands, being induced to do so by the
 solicitations and importunities of his wife; she promis-
 consideration therefor, and as an inducement thereto,
 to make and execute her will, and therein bequeath and de-
 to him one third of her estate, including said lands; and
 in consideration of this promise on her part, he did ex-
 a deed conveying the lands to her. The bill further
 that Mrs. Manning died in 1884, without complying
 with her promise, and without making any will. The bill

avers that the deed to the wife recites a valuable consideration, which is not true as stated. The true consideration, it avers, was the promise of the wife to make her will, and therein provide for the husband as is stated above. It is not stated whether or not her said promise to make a will was in writing. In this state of the pleading we cannot assume that Mrs. Manning's promise was simply oral, and pronounce absolutely on the sufficiency of the averments to take the case without the influence of the statute of frauds. To authorize that defense to be raised by demurrer, the bill must show affirmatively that the contract or promise declared on was not in writing: *Bromberg v. Heyer*, 69 Ala. 25; *Phillips v. Adams*, 70 Id. 373.

Treating the case then, as if Mrs. Manning's alleged promise to make a will was in writing subscribed by her, the question arises, Under what conditions and to what extent is such promise binding? Pretermitted for the present her disability on account of coverture, the authorities are overwhelming, and rest on the soundest basis, that such a promise, supported by a valuable consideration, is valid and binding unless assailed on some other sufficient ground: *Bolman v. Overall*, 80 Ala. 451; *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773, and note containing citation of authorities 784; *Caviness v. Rush-ton*, 101 Ind. 500; 51 Am. Rep. 759.

The case made by the present bill is, that, relying on the said promise of Mrs. Manning to make the alleged will, he, the complainant, conveyed to her the land in controversy, and she died the owner of it. If this be true, Mrs. Manning's coverture is no bar to any appropriate relief that can be carved out of the land thus conveyed. The land being acquired on the faith of such promise, equity will charge it with a trust, in the nature of unpaid purchase-money, for the indemnification of the vendor, to the extent he has suffered from her breach of promise: *Marks v. Cowles*, 53 Ala. 499; *Moore v. Worthy*, 56 Id. 103; *Sterrett v. Coleman*, 57 Id. 172; *Norman v. Harrington*, 62 Id. 107; *Carver v. Eads*, 65 Id. 190.

The promise of Mrs. Manning being only to make a will, she had her lifetime to do it in; and there was no actionable breach until she died without having complied with her promise. It follows that the statute of limitations did not begin to run until her death. It opposes no bar in this case if the complainant is otherwise entitled to relief: *Bolman v. Lohman*, 80 Ala. 451.

If the agreement was such as is set up in the bill, then the conveyance of land made by complainant to his wife was a valuable consideration, which would uphold and bind her promise to make the alleged will; and her promise was a valuable consideration on which his deed to her was executed. This, if true, takes the transaction without the category of a voluntary conveyance or gift by the husband to his wife, and constitutes it a deed of bargain and sale on valuable consideration. The consideration of the deed being on its face valuable, that clause was open to parol proof of any other valuable consideration, because such proof would not change the legal effect of the conveyance as a muniment of title. The promise of the wife, if made, was a valuable consideration, and there is no incompatibility between it and any other valuable consideration which the deed may recite: *McGehee v. Rump*, 37 Ala. 651; *M. & M. R'y Co. v. Wilkinson*, 72 Id. 286; *String-jellow v. Ivis*, 73 Id. 209.

The court of chancery being without power to compel the execution of a will, specific execution of the agreement could at no time have been enforced. But the complainant is not without remedy. True, if Mrs. Manning had property other than the land, her promise, she being a married woman, could not bind it, unless it was an equitable estate. Having acquired the land, however, on the faith and consideration of the promise she made, chancery will seize upon it, fasten a trust upon it as for unpaid purchase-money, and, as far as its value will extend, will secure to the complainant what he lost by his wife's failure to keep her promise.

The third of the land can be secured to him in kind. If, at her death, she possessed other property, or property interests, which would have inured to him under the will, if made as per alleged agreement, then, as far as the residue of the land will furnish the means, this should be made good to him.

In what we have said above we have treated this case as if Mrs. Manning's agreement to make a will in the terms alleged was in writing, and signed by her. Presented as the question is, we are bound to so treat it. The demurrer, alike to the original and amended bill, ought to have been overruled.

It is possible, if not probable, that Mrs. Manning's promise to make a will was oral; and if so, when the case returns to the chancery court, it will be necessary to consider it in the light of the statute of frauds. To prevent its returning upon

INSURANCE. — WAIVER OF FORFEITURE of policy of insurance, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel, and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture.

INSURANCE — WAIVER OF FORFEITURE. — Where an insurance company, after knowledge of the breach of a condition in the policy, enters into negotiations or transactions with the assured which recognize and treat the policy as still in force, and induces the assured to incur trouble or expense, it waives the right to insist upon a forfeiture.

INSURANCE — BREACH OF CONDITION — FORFEITURE. — The mere omission of an insurer to repudiate and annul a policy for breach of condition therein, and to notify the insured that it claimed the forfeiture, is not a legal waiver of the right to claim it if the insurer did not receive notice of the breach of condition until after the loss.

INSURANCE — WAIVER OF FORFEITURE. — The knowledge of the insurer of a breach of condition in the policy is necessary to a waiver of its forfeiture. Therefore a waiver does not arise from notice of such breach to an agent who is only authorized to solicit and take applications for insurance, receive premiums, and deliver policies, but who has no right to waive a breach of such condition, nor to settle a loss; nor does a waiver arise where the company's adjuster, with knowledge of such breach, agrees to select arbitrators to appraise the loss, but also stipulates that their appointment "is without reference to any other questions within the terms and conditions of the insurance contract as expressed in the policy," the latter providing that such appraisalment "shall not determine the validity of the contract, nor the liability of this company, nor any other question except only the amount of such loss or damage."

INSURANCE. — SPECIAL AUTHORITY TO INSURANCE AGENT to adjust a particular loss or damage does not confer authority to bind the company by a promise to pay such loss or damage.

Tompkins, London, and Troy, for the appellant.

Watts and Son, contra.

CLOPTON, J. The action is brought by appellee on a policy insuring a stock of goods against loss or damage by fire. On the evidence, there can be no controversy as to the destruction of the goods or their value. It is only necessary to consider the questions arising on the special defenses. These are: 1. Want of insurable interest; 2. Concealment of a fact material to the risk; and 3. Forfeiture of the policy.

The averments of the plea setting up want of insurable interest are, that plaintiff was a married woman, under the disabilities of coverture, at the time of the issuance of the policy, and has continuously remained such; that she purchased the insured goods on a credit, for the purpose of carrying on a mercantile business, and asserts that no interest or title passed to her by the purchase, and has repudiated, and

still repudiates and denies, her liability to pay for the goods. It is contended that the contract of purchase is absolutely void and inoperative to pass an insurable interest.

The statutes creating the separate estates of married women in force at the time of the issuance of the policy, having been construed not to confer capacity, nor to enlarge the common-law capacity of the wife, to acquire property by purchase on credit, the character and operation of such contract of purchase must be determined by the principles of the common law. The authorities are in conflict on the question of the wife's power to purchase on credit when she has no separate estate which she can bind; but they hold quite uniformly that she may make a valid purchase of other property on credit when she is possessed of a separate estate which she can charge by the contract of purchase, and such property, when purchased, becomes her separate estate. *Wilder v. Abernethy*, 54 Ala. 644, 25 Am. Rep. 734, is not inconsistent with this doctrine. That case was a trial of the right of property between a creditor of the husband and the wife as claimant, in which the legal title only was involved. The goods were purchased on credit by the husband for the purpose of trade in the name of his wife, passed into and continued in his possession until they were seized by the sheriff under an execution against him, and were unpaid for at the time of the levy. It is said: "The goods having been purchased only on credit of the wife, and the contract of purchase not being a charge upon the separate estate created by the deposit by her father with her husband (the only separate estate she is shown to have had), no legal title to the goods passed to her." Manifestly, the decision would have been otherwise had Mrs. Abernethy possessed a separate estate on which the contract of purchase was a charge. The omission of the plea to aver that the plaintiff did not possess such separate estate is an answer to its sufficiency, if there were no other.

The capacity of a married woman to purchase property on credit with the assent of her husband, though she may have no separate estate, must be regarded as settled in this state. It has been repeatedly held that at common law the wife may make, during coverture, a valid purchase on credit of real estate with the assent of the husband, or if without his consent, subject to his disaffirmance; and if he does not dissent, such purchase creates in the wife a legal or equitable interest, as may be the nature and effect of the transaction, which be-

comes her separate estate: *Marks v. Cowles*, 53 Ala. 499; *Proust v. Hoge*, 57 Id. 28; *Sharp v. Sharp*, 76 Id. 312. There is nothing in the character or qualities of personal property which calls for the application of a different rule. Though a married woman cannot, at common law, bind her person by a contract of purchase, if the vendor is willing to risk her voluntary payment, his transfer will be valid against all persons, unless it may be the creditors of the husband: *Knapp v. Smith*, 27 N. Y. 277; *Kelly on Contracts of Married Women*, 160.

2. The second plea avers, in addition to the foregoing facts, that the plaintiff concealed the fact of her coverture, and that the agents of defendant were forbidden to issue policies of insurance on stocks of merchandise in the hands of married women. It follows, from what we have said, that the coverture of plaintiff is not a fact material to the risk. The agents of defendant were apparently clothed with general powers to solicit and take applications for insurance from any and all persons. Private instructions to such agent, uncommunicated to the plaintiff, will not affect her rights.

3. The policy of insurance contains the condition that it shall be and become void in case the assured "shall now have, or hereafter make or accept, any other insurance, whether valid or not, on any of the property above described, without the written consent of the company indorsed hereon." The evidence indisputably shows that the plaintiff subsequently accepted a valid policy of insurance on the same stock of goods from the Hibernia Insurance Company. The agent of the latter company who issued the policy was informed of the first insurance, and embodied in the policy a permit for additional insurance, and informed the plaintiff that she had to give defendant notice of the second insurance. The amount due on this policy has been paid. The second insurance being valid, we are relieved of the necessity of considering the question, so elaborately argued by counsel, whether accepting invalid additional insurance would avoid the contract. The court held, and properly held, that procuring additional valid insurance without the consent of defendant was a breach of the condition of the policy. Such additional insurance having been taken and accepted without notice to the defendant, the contract is avoided, unless the company has waived the right to claim the forfeiture, which the plaintiff insists has been done.

4. On breach of the condition and forfeiture of insurance,

the defendant had the election to avoid the policy or waive its right to claim the forfeiture. Conditions in a policy of insurance limiting or avoiding liability are strictly construed against the insurer, and liberally in favor of the assured. Though a waiver may be in the nature of an estoppel, and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations or transactions with the assured which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture. But notice or knowledge of the breach is essential to a waiver. If the defendant did not have notice of the forfeiture until after the destruction of the goods, some affirmative act or conduct is requisite. In such case, "a waiver cannot be inferred from mere silence. It [the company] is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture." The mere omission of defendant, if it did not receive notice of the additional insurance until after the destruction of the goods, to repudiate and annul the policy, and acquaint the plaintiff that it claimed the forfeiture, is not, as matter of law, a waiver of right to claim it: *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

On proof that the local soliciting agent of defendant went to the place of the fire on the morning after it occurred, in company with the agent of the Hibernia Insurance Company, and with him examined into the condition of the goods, observing that he would have to telegraph for an adjuster, the court instructed the jury that they could look to these facts, in connection with the other evidence, to determine whether or not the defendant, through its agents, elected to treat the policy as subsisting, after knowledge of the second insurance, and that notice to the soliciting agent was notice to the company. Notice to an agent is notice to the principal only when it is acquired while engaged in the business of the principal, within the scope of his authority, and respecting a transaction then pending: *Hill, Fontaine, & Co. v. Helton*, 80 Ala. 528. On this principle, notice to the soliciting agent, while receiv-

comes her separate estate: *Marks v. Cowles*, 53 Ala. 499; *Proud v. Hoge*, 57 Id. 28; *Sharp v. Sharp*, 76 Id. 312. There is nothing in the character or qualities of personal property which calls for the application of a different rule. Though a married woman cannot, at common law, bind her person by a contract of purchase, if the vendor is willing to risk her voluntary payment, his transfer will be valid against all persons, unless it may be the creditors of the husband: *Knapp v. Smith*, 27 N. Y. 277; *Kelly on Contracts of Married Women*, 160.

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the defendant had the election to avoid the policy or waive its right to claim the forfeiture. Conditions in a policy of insurance limiting or avoiding liability are strictly construed against the insurer, and liberally in favor of the assured. Though a waiver may be in the nature of an estoppel, and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations or transactions with the assured which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture. But notice or knowledge of the breach is essential to a waiver. If the defendant did not have notice of the forfeiture until after the destruction of the goods, some affirmative act or conduct is requisite. In such case, "a waiver cannot be inferred from mere silence. It [the company] is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture." The mere omission of defendant, if it did not receive notice of the additional insurance until after the destruction of the goods, to repudiate and annul the policy, and acquaint the plaintiff that it claimed the forfeiture, is not, as matter of law, a waiver of right to claim it: *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

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ing the application for insurance, of a material fact or inaccuracy in the application, is notice to and binds the company: *Peid. & Ar. Ins. Co. v. Young*, 58 Id. 476. The evidence shows that a soliciting agent has nothing to do with settling the loss. An agent who is only authorized to solicit and take applications for insurance, receive the premiums, and deliver the policy after having been signed by the proper officers, has no authority, express or implied, to waive a breach of the condition of the policy relating to additional insurance: *Bush v. Westchester Fire Ins. Co.*, 63 N. Y. 531; *Bartholomew v. Mer. Ins. Co.*, 25 Iowa, 507; *Harrison v. City Fire Ins. Co.*, 9 Allen, 231; 85 Am. Dec. 751; *Hamilton v. Aurora Fire Ins. Co.*, 15 Mo. App. 59; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; *Liverpool, L., & G. Ins. Co. v. Sorsby*, 60 Miss. 302; *Van Allen v. Farmers' Ins. Co.*, 64 N. Y. 469; May on Insurance, sec. 138.

A few days after the fire, Hawks, an adjuster representing both companies, came, and, by agreement with plaintiff, an appraisement of the value of the goods was made by persons selected in pursuance of the terms of the policy. The adjuster, having been informed that there was a second insurance, entered into an agreement with plaintiff for the selection of arbitrators to make the appraisement. The agreement provides: "It being agreed and understood that this appointment is without reference to any other question within the terms and condition of the insurance contract as expressed in the policy." The policy also contains a provision that the appraisement of the value of the property by arbitrators chosen by the parties "shall not determine the validity of the contract, nor the liability of this company, nor any other question, except only the amount of such loss or damage." There was evidence tending to show that Hawks promised to pay the loss. Hawks was not the generally retained adjuster of defendant, but was employed in particular cases. Special authority to an agent to adjust loss and damage does not confer authority to bind the company by a promise to pay the loss. It may be that if the company, with knowledge of the forfeiture, had authorized an agent to adjust the loss, a liability and a promise to pay would ordinarily be implied; but the implication may be rebutted, either by the terms of the policy or by an agreement reserving the question of liability. The validity of the agreement is not impeached. There is no pretense that its contents were concealed or misrepresented. The

plaintiff signed it on the opinion and advice of a trusted friend. An agreement that the adjustment shall be made "without reference to any other terms and conditions of the insurance contract" is a reservation of the question of liability. Such agreement cannot be construed as more than a promise to pay the loss in the event the company is liable. Waiver of a right to claim a forfeiture for a breach committed before the loss of the property is not the legal result of an adjustment of the loss under the policy and agreement: *Whipple v. No. B. & M. Fire Ins. Co.*, 11 R. I. 139; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; 81 Am. Dec. 521; *Jewett v. Home Ins. Co.*, 29 Iowa, 562; May on Insurance, sec. 138. The charge of the court as to the effect of the agreement is in accord with these views.

There being no other evidence of notice to defendant of the second insurance than stated above, the affirmative charge requested by defendant should have been given.

Reversed and remanded.

INSURANCE — WAIVER OF CONDITIONS IN POLICY: See note to *Ment v. Home Ins. Co.*, 9 Am. St. Rep. 163; *Kruger v. Western etc. Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42, and note 45; *Wilson v. Minnesota etc. Ass'n*, 36 Minn. 112; 1 Am. St. Rep. 659, and note 660; *Oshkosh etc. v. Germania etc. Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233, and note 236; *Commercial Union Ins. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562, and note 565-572; *Firemen's Ins. Co. v. Floss*, 67 Md. 403; 1 Am. St. Rep. 398, and note 405, 406; *Stylous v. Wisconsin etc. Ins. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and note 740; *Ellis v. Ashland etc. Ins. Co.*, 117 Pa. St. 548; 2 Am. St. Rep. 703, and note 706; *Home Protection of Alabama v. Avery*, 85 Ala. 348; 7 Am. St. Rep. 54, and note 57; *Brown v. State Ins. Co.*, 74 Iowa, 428; 7 Am. St. Rep. 495, and note 499. If a married woman, though living apart from her husband, represents, in her application for insurance, that she is a widow, this is sufficient to avoid a life insurance policy; but if the clerk of the insurance company is afterwards informed that she is a married woman, and the company levies and collects two assessments on the policy, this constitutes a waiver of its right to avoid the policy: *Fitzpatrick v. Hartford L. I. Co.*, 56 Conn. 116; 7 Am. St. Rep. 288, and note 298. Where an agent of a fire insurance company went to the scene of a fire, and made inquiries, the nature of which was not shown, and requested an arbitration to fix the amount of loss, one half of the expense of which was paid by the assured, which arbitration and division were provided for in the policy, which further stipulated that such submission should not be taken as a waiver on the part of the company of the conditions of the policy, the company had a right to make the inquiries and investigate as to the origin of the fire and the value of the property, and there was no room for claiming any waiver on the part of the company: *Briggs v. Firemen's Fun. Co.*, 65 Mich. 52; compare the case of *Marlinton v. North British etc. Co.*, 64 Id. 372. Where an insurance has been forfeited by a judicial sale of the insured property, it is competent for the insurers, being notified, actually or constructively, of such

sale, to waive the forfeiture; and if the property is reacquired by the assured, the insurance will reattach to it: *Elliot v. Ashland Mut. F. Ins. Co.*, 117 Pa. St. 548.

INSURANCE — CONCEALMENT OF FACTS. — The insurance agent not having questioned the plaintiff as to what the building contained besides the property insured, it is no defense that such building contained other property, which increased the risk, unless the plaintiff fraudulently concealed such fact from the agent: *Campbell v. American Ins. Co.*, 73 Wis. 100. And the distinction between a warranty and a representation is, that the warranty must be true, while, on the other hand, the representation need only be true so far as it is material to the risk; and it is material to the risk when a knowledge of its falsity would have induced the insurers to have refused the risk, or to have made a higher rate of premium: *Chrisman v. State Ins. Co.*, 16 Or. 284.

INSURANCE — CONDITION AGAINST OTHER INSURANCE: See *Gillett v. Liverpool etc. Ins. Co.*, 73 Wis. 203; 9 Am. St. Rep. 784, and note 788; note to *Funke v. Minnesota F. M. F. Ins. Co.*, 43 Am. Rep. 221, et seq.; note to *Thomas v. Builders' M. F. Ins. Co.*, 20 Id. 319-323; note to *Stolle v. Aetna F. M. Ins. Co.*, 27 Id. 597, 598; *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7; 4 Am. St. Rep. 120, and cases collected in note 123. Where an insurance policy was taken by the plaintiff jointly upon horses and mules, which were sometimes kept in a barn owned by the plaintiffs, in which they were destroyed by the burning of the barn, the policy having the usual clause against prior insurance, and plaintiffs at the time held a policy on the barn and contents in another company, this was a breach of the condition against prior insurance on the mules and horses: *Howidge v. Dwelling-House Ins. Co.*, 75 Iowa, 374. A policy of insurance containing a stipulation that if there shall be any other insurance on the property, whether valid or otherwise, at the time of its issuance, or at any other time during its continuance, without the consent of the insurer, will be forfeited, if the insured, in forgetfulness of the fact that such policy has been issued, and in good faith, procures other risks on the same property, without the consent of the insurer: *Sugg v. Hartford F. Ins. Co.*, 98 N. C. 143.

COLUMBUS AND WESTERN RAILWAY COMPANY v. BRIDGES.

[86 ALABAMA, 448.]

PLEADING AND PRACTICE — ERROR WITHOUT PREJUDICE. — Where a complaint contains irrelevant and redundant averments, they should be stricken out on motion, but the refusal to strike them out is not reversible error, unless it affirmatively appears that prejudice results thereby to defendant.

RAILROADS — CONSTRUCTION OF BRIDGES AND TRESTLES — LIABILITY FOR INJURY FROM FLOOD. — A railroad company is bound to bring to the construction of its ways and works the knowledge and skill of engineering generally known and applied in such business, and to provide against such casualties as a cautious and prudent man possessing the same knowledge and skill would or should foresee or anticipate; and in the location and erection of its bridges and trestles, regard should be had

to the size and nature of the stream, the character and features of the adjacent country, the relative position and formation of the abutting land, its liability to overflow, with the probable extent and effect thereof. They should be so constructed as not to be subject to the risks and perils arising from rainfall known by experience to be incident to that section of country, though rarely occurring, or which competent and skilled engineers should reasonably anticipate. But the company is not bound to provide against unusual or extraordinary floods, such as have never been known to occur, and which could not have reasonably been foreseen by competence and skill.

RAILROADS — CONSTRUCTION OF BRIDGES — NEGLIGENCE. — Where damages are claimed for injury arising from the falling of a trestle while a railway train was attempting to cross in time of unusual and extraordinary flood, unless it is proved that the negligent and insufficient manner in which the trestle was constructed was the real and proximate cause of the injury, or that its insecure and dangerous condition was known to the company, the latter is not liable, and if such flood was of such overpowering and destructive character as to produce the injury, apart from and independent of the particular negligence alleged in the construction of the trestle, there is no liability, though some negligence may have existed in its construction and maintenance.

RAILROADS — NEGLIGENCE OF EMPLOYEES — SIGNALS. — Where a railroad company is liable for the negligence of a watchman or flag-man to give proper signals, unless a signal is given in accordance with the rules of the company prescribing the manner in which such signal must be given, a conductor or engineer is not authorized to rely upon it, and if he does, and injury ensues to him in consequence, and no other negligence contributed to produce it, negligence cannot be imputed to the company.

RAILROADS — CONTRIBUTORY NEGLIGENCE — EMPLOYEE. — Where an engineer in charge of a construction train is killed by the fall of a bridge over which he is attempting to pass in time of unprecedented flood, and the evidence shows that he had examined the bridge the same day, and knew, or ought to have known, that the water was rapidly rising, then if he knew the manner in which the bridge was constructed, the unusual character of the flood, the danger to the bridge from overflow, and the rapid rising of the water, and with such knowledge attempted, without compulsion, necessity, or superior orders, the hazardous passage, his negligence sufficiently contributed to his injury to defeat recovery.

MASTER AND SERVANT — MEASURE OF DAMAGES FOR INJURY TO EMPLOYEE. — Section 2591, Alabama Code, authorizing the personal representative to maintain an action where an injury through the negligence of the master results in the death of an employee, does not provide for punitive or vindictive damages, in the absence of proof of willful, wanton, or reckless negligence on the part of the master, but pecuniary gain from continuance of life constitutes an element of damages in such cases, and evidence that the party injured was afflicted with a pneumonic complaint which affected the probable continuance of his life should be admitted.

George P. Harrison, Jr., and John M. Chilton, for the appellant.

W. D. Bulger, Thomas L. Bulger, and J. O. Richardson, contra.

CLOPTON, J. The statutes regulating the system of pleading require that all pleadings shall be as brief as is consistent with perspicuity and the presentation of the facts and matter to be put in issue in an intelligible form, and also provide that any pleading unnecessarily prolix, irrelevant, or frivolous may be stricken out on motion of the adverse party: Code 1886, secs. 2664, 2665. It may be conceded that some of the counts of the complaint contain irrelevant and redundant averments which should have been stricken out on motion of defendant. But the refusal of the court to strike them out is not a reversible error, unless it affirmatively appears that thereby prejudice resulted to defendant: *Goldsmith v. Picard*, 27 Ala. 142.

Plaintiff's intestate was an employee of defendant in the capacity of conductor and engineer of a construction train. The injuries which caused his death were received while attempting to pass with his train over a bridge across the Tallapoosa River from the west to the east side. The trestle which constituted the approach to the bridge from the east gave way under the weight of the train, in consequence of the foundations having been washed out by overflowing water, caused by an unusual flood. The action is brought by plaintiff, as administratrix, under the "employer's act," which composes sections 2590-2592 of the Code of 1886. Negligence is charged in two respects: 1. In the alleged defective foundation of the trestle; and 2. In the signal averred to have been given by the watchman at the bridge.

The rule governing the liability of railroad companies for injuries caused by floods should be regarded as well defined and settled by an almost unbroken line of adjudicated cases. It rests on the general principle that the measure of the company's duty in constructing and keeping the ways, works, machinery, and plant free from dangerous defects is such care and diligence as a man of caution and prudence would exercise under like circumstances. The company is bound to bring to the construction of its ways and works the knowledge and skill of engineering generally known and applied in such business, and to provide against such casualties as a cautious and prudent man possessing the same knowledge and skill would or should reasonably foresee and anticipate. In the location and erection of bridges and trestles, regard should be had to the size and nature of the stream, the character and features of the adjacent country, the relative position

and formation of the abutting land, its liability to overflows, and their probable extent and effect. They should be so constructed as not to be subject to the risks and perils arising from rainfalls known by experience to be incident to the particular section of the country, though rarely occurring, or which competent and skilled engineers should reasonably anticipate. But they are not bound to provide against unusual or extraordinary floods, such as have never been known to occur previously, and which could not have reasonably been foreseen by competent and skillful persons.

Pitts., Fort Wayne, and Chic. R'y Co. v. Gilleland, 56 Pa. St 445, 94 Am. Dec. 98, was an action for an injury caused by the continuance of a culvert, which, it was alleged, was so negligently constructed as not to furnish sufficient vent for all the water flowing down the channel of the stream. After substantially saying that in such case proper engineering should observe the size of the stream, the character of its channel, and the declivity of the circumjacent territory which forms the water-shed, and supply the means of avoiding the injury which would result from locking up the natural flow or obstructing its passage so as to cause a reflux in the times of ordinary high water, Agnew, J., says: "Beyond this, prudent circumspection cannot be expected to look, and there is, therefore, no liability for extraordinary floods,—those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one."

The evidence clearly establishes that the flood was not only unusual and extraordinary, but greater and more destructive than had ever before happened in the memory of the inhabitants,—a flood which human ken could not have foreseen, nor the greatest caution and prudence could have reasonably anticipated. There is no liability on defendant for not having provided against the dangers and consequences of such a flood: *International etc. R. R. Co. v. Halloren*, 3 Am. & Eng. R. R. Cas. 343; *H. & T. Cen. R'y Co. v. Fowler*, 8 Id. 504; 12 Am. & Eng. R. R. Cas. 196; Patterson on Railway Accident Law, secs. 30, 31.

Not controverting this rule, plaintiff contends that there was negligence on the part of the company in the construction and maintenance of the foundations of the trestle, which concurred with the flood in producing the injury to her intestate. Notwithstanding the flood may have been unusual and unpre-

cedented, if the insufficient construction of the trestle was the proximate and real producing cause of the injury, the defendant would be liable; but if the flood was of such overpowering and destructive character as to produce the injury, apart from and independent of the particular negligence alleged in constructing the foundations of the trestle, there is no liability, though there may have existed some negligence in their construction and maintenance: *Baltimore etc. R. R. Co. v. S. S. S. Dist.*, 96 Pa. St. 65; 42 Am. Rep. 529. The true test is, Was the trestle so negligently constructed as to be insufficient and insecure in cases of usual and ordinary floods incident to that section? If it was sufficient and safe at such times, though insufficient to stand against extraordinary floods, negligence in its construction cannot be regarded as the real producing cause of the injury. The evidence shows that the trestle had been constructed about fifteen years previously, in the manner in which such trestles are generally constructed by the best managed railroad companies, and had stood, during all that period, on the same or similar foundations, affording safe passage for engines and trains without accident or objection; and nothing is shown to have occurred which indicated danger in its continuance. On these facts the court should have instructed the jury that there is no ground to impute negligence to defendant in its construction or maintenance.

The plaintiff, however, further insists that the negligence of the watchman at the bridge in giving the safety instead of the danger signal, when the train was approaching the bridge from the west, concurred with the flood in causing the injury. The contention is based on subdivision 4 of section 2590 of the Code of 1886, which provides that the employer is liable to answer in damages to the employee, "when such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway." On the question of fact, whether any signal was given, the evidence is in conflict. Railroad companies have authority, and, it may be said generally, it is their duty, to prescribe suitable rules and regulations for the direction and management of their trains for the purpose of protecting their employees, as well as passengers. The rules provided by defendant were introduced in evidence, and prescribe the manner in which signals must be given, to signify whether

the train shall move forward, stop, or move backward; and also that the person of the watchman must be kept in sight, as a signal to approaching trains that all is right. There is also evidence that the signal of safety must be given at the end of the bridge which is being approached by the train. Unless a signal is given in accordance with the rules of the company, a conductor or engineer is not authorized to rely on it; and if he does, and injury ensues to him in consequence thereof, there being no other act of negligence contributing to produce it, the negligence which renders the company liable under the fourth subdivision of section 2590 cannot be imputed to the company.

We have heretofore held that the "employer's act" does not take from the employer the defense of contributory negligence: *Mobile & B. R'y Co. v. Holborn*, 84 Ala. 133. The statute expressly declares that the employer is not liable, if the employee knew of the defect or negligence, and failed, in a reasonable time, to give information thereof to the employer, or to some person superior to himself in the employment of the employer, unless he was aware that the employer, or such superior, already knew of such defect or negligence. In this case there was neither time nor opportunity in which to give the defendant notice, and the company could not have known of the defect or negligence, — no room for the operation of this provision of the statute. No person superior to plaintiff's intestate in the employment of defendant is shown to have been present. He was both conductor and engineer of his train, directed its management, and controlled its movements. He was under no orders from any superior to move his train from the west to the east side of the river on that evening. His attempt to cross the bridge was of his own volition, no doubt prompted to do so by a desire to be, on the next morning, at the place most convenient to prosecute the work in which he was specially engaged, — repairing the trestles which had been washed out on either side of the river. The evidence tends to show that he had examined the bridge during the day, and knew, or should have known, that the water was rapidly rising. If he knew the manner in which the trestle was constructed, the unprecedented character of the flood, the imminent danger to the trestle by the overflow of the river, and the rapid rising of the water, and with such knowledge and under such surroundings attempted, without compulsion or necessity, the hazardous passage of the bridge, his negli-

gence sufficiently contributed to his injury to defeat a recovery by plaintiff.

Section 2591 authorizes the personal representative to maintain an action if the injury results in the death of the employee, and directs the distribution of the recovery. The statute does not prescribe or fix the measure of damages, neither are they submitted to the arbitrary discretion of the jury. It has no punitive purpose, and the common-law rules as the measure of damages are applicable. It is wholly unlike, in its objects and purposes, the statute of February 5, 1872, which was intended to prevent homicide. As pecuniary gain from a continuance of life constitutes an element of damage in this class of cases, the court should have admitted the evidence that plaintiff's intestate was afflicted with a pneumonic complaint which affected the probable continuance of life. There is no evidence tending to prove, or from which could be inferred, willful, wanton, or reckless negligence on the part of the company. The charge requested by defendant, that on the facts punitive or vindictive damages cannot be recovered, should have been given: *Ala. G. S. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354.

We have considered and endeavored to state the principles which should govern the case on another trial, without applying them specially to the several rulings of the court, deeming such application unnecessary; and, as there was no opportunity to give the defendant information of the defect or negligence, we regard it unnecessary to consider the demurrer based on the ground that the complaint omits to aver such facts.

Reversed and remanded.

HARMLESS ERROR. — There will be no reversal for harmless, immaterial errors which work no prejudice to the complainant: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and note 638; *Stutz v. Chicago etc. R'y Co.*, 73 Wis. 147; 9 Am. St. Rep. 769, and note 778; *Masonic Mut. Ben. Soc. v. Lackland*, 97 Mo. 137; 10 Am. St. Rep. 298, and note; *Sweeney v. Schultes*, 19 Nev. 53. A party who is not harmed by the refusal of the trial court to strike out parts of a special verdict, on the ground that they embrace more than conclusions of law, cannot predicate available error on such ruling: *Louisville etc. R'y Co. v. Flanagan*, 113 Ind. 488.

RAILWAYS ARE NOT LIABLE FOR UNFORESEEN ACCIDENTS: *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193; *Lafflin v. Buffalo etc. R. R. Co.*, 106 N. Y. 136; 60 Am. Rep. 433. The company is not bound to keep its premises absolutely safe, and is never liable for accidents which happen by reason of a want of ordinary care on the part of the person injured: *Wabash etc. R'y Co. v. Locke*, *supra*.

BRIDGES.—Where a foot-passenger, while crossing a long and narrow county bridge in a large city, was caught by the wheel of a wagon drawn by a team of runaway horses, and injured, the injury occurring on the foot-way, which was narrow, and not separated from the wagon-road by any guard or rail, in an action against the county for such injury so sustained it was held that it was unreasonable to suppose that such an occurrence could be foreseen by the authorities as the result of a failure to erect guards, and therefore the county was not liable: *Lehigh County v. Hoffort*, 116 Pa. St. 119; 2 Am. St. Rep. 587, and note 591. A municipality is not liable because one of its bridges is not absolutely safe; and where a bridge breaks down under an unreasonable and extraordinary load, which reasonable care and prudence could not have anticipated, the municipality is not liable: *Wilson v. Town of Greely*, 47 Conn. 59; 36 Am. Rep. 51. Where a railway bridge is so negligently constructed across a river as to form an unlawful obstruction, and become a nuisance by causing overflows, no right of action accrues to the land-owner till he sustains actual injury thereby: *Omaha etc. R. R. Co. v. Stenden*, 22 Neb. 343.

RAILWAYS—CONSTRUCTION OF ROAD.—A railroad company, in constructing its road and works, is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in such works: *Pittsburgh etc. R. R. Co. v. Gilleland*, 56 Pa. St. 445; 95 Am. Dec. 98. A railway company is not liable for so constructing a culvert that it will not pass an extraordinary flood: *Id.* A railway company in constructing its bridges, culverts, and embankments must provide against such damages as might be reasonably anticipated from the overflow of a stream, but the company will not be guilty of that culpable negligence that would make it responsible in damages, if it failed to provide against such extraordinary floods as could not have been reasonably foreseen by men possessing ordinary engineering skill and capacity required in the construction of railroads: *Railway Co. v. Pool*, 70 Tex. 713. A railroad company in constructing its road is not bound to provide against an unprecedented flood, but must provide against ordinary storms: *McPherson v. St. Louis etc. R'y Co.*, 97 Mo. 253; *Sherlock v. Louisville etc. R'y Co.*, 115 Ind. 22.

PERSONAL INJURIES—MEASURE OF DAMAGES: See *Houston etc. R'y Co. v. Bosser*, 70 Tex. 530; 8 Am. St. Rep. 615, and note 618; *Alabama etc. R. R. Co. v. Yarbrough*, 83 Ala. 238; 3 Am. St. Rep. 715, and cases collected in note 719; *Louisville etc. R. R. Co. v. Stacker*, 86 Tenn. 343; 6 Am. St. Rep. 840, and note 847; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135, and note; *Clapp v. Minneapolis etc. R'y Co.*, 36 Minn. 6; 1 Am. St. Rep. 629, and note 632; note to *Stuts v. Chicago etc. R'y Co.*, 9 Am. St. Rep. 778; *Railway Co. v. Silliphant*, 70 Tex. 625.

DAMAGES, EXEMPLARY, WHEN AND UNDER WHAT CIRCUMSTANCES ARE RECOVERABLE: See *Stuts v. Chicago etc. R'y Co.*, 73 Wis. 147; 9 Am. St. Rep. 778, and recent cases cited in note thereto 777; *Pittsburgh etc. R. R. Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note. Where it is sought to recover such damages as are not usual and natural as the consequences of the wrongful act complained of, such damages must be specifically set forth: *City of Pueblo v. Griffin*, 10 Col. 366. Exemplary damages cannot be recovered in a civil action, although the tort complained of is willful, and it is not punishable criminally: *Greely etc. R'y Co. v. Yeager*, 11 Id. 345. Liability for punitive damages arises from the wrongful motive of the defendant, and where this wrongful motive is not inherent in the offense which fixes his lia-

bility, complainant must present some proof from which such motive may be legally inferred: *Haines v. Schultz*, 50 N. J. L. 481. While courts will allow liberal compensatory damages against railway companies for gross fault and negligence resulting in severe injuries to passengers, still railway companies are and should always be entitled to protection against exaggerated and stale claims for injuries, particularly when such injuries are slight and nominal: *Maher v. Louisville etc. R'y Co.*, 40 La. Ann. 64. Exemplary damages can never be allowed in the absence of actual damages: *Kuhn v. Chicago etc. R. R. Co.*, 74 Iowa, 137.

CONTRIBUTORY NEGLIGENCE.—Instances of what is contributory negligence: See note to *Virginia Midland R. R. Co v. White*, 10 Am. St. Rep. 882; *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and cases and instances enumerated in note thereto 850, 851. Where a highway crosses a double track, over which cars are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obscured by the presence of a passing car on the track nearer him, to pass quickly upon the crossing as soon as the first train passes, without waiting to look or listen for the approach of a train in the opposite direction on the second track: *Marty v. St. Paul etc. R'y Co.*, 38 Minn. 108. An employee of a railway who voluntarily puts himself in a dangerous position at a time and place when and where he has no right to be, and when he must have known that the company did not require his presence, and is injured because of his own want of common prudence, cannot recover of the company for such injury: *Loeffler v. Missouri Pac. R'y Co.*, 96 Mo. 267. A railway company is compelled oftentimes by the necessity of its business to permit crossings at its depots to be temporarily obstructed by its trains; and a person who is injured at such a crossing at such a time cannot recover because of such obstruction, unless the crossing was kept closed for an unreasonable length of time, and the injury was the proximate result of the company's unreasonable delay in removing the train from the crossing: *Barkley v. Missouri Pac. R'y Co.*, 96 Mo. 367. Although a railway company may be negligent in failing to give proper warnings of the approach of a train, a person injured cannot recover therefor unless it be affirmatively shown that he was free from contributory negligence; for if by looking he could have seen an approaching train in time to escape, it will be presumed, in case he is injured by a collision, that he did not look, or if he did look, he failed to heed what he saw; and such conduct would of itself be contributory negligence barring recovery: *Ohio & M. R'y Co. v. Hill*, 117 Ind. 56. A person who enters upon a railway track at a crossing when gates with signal-lanterns are down, and passes in front of an approaching train already upon the crossing, and is killed by another train running upon another track at its usual speed and on time, is guilty of contributory negligence which will prevent any recovery for his death: *Granger v. Boston & A. R. Co.*, 146 Mass. 276. Where plaintiff's own negligence is the proximate cause of injury to himself, by reason of his placing himself between two railroad tracks, at a place where he should not have been, in the due performance of his duty as an employee of the company, and with his back toward an approaching train, which strikes him, he cannot recover, even though the company displayed no light upon the approaching train, and did not comply with a municipal ordinance: *Ryall v. Central Pac. R. R. Co.*, 76 Cal. 474. One who receives an injury from the negligence of another, and neglects to use such means to effect a recovery as a prudent man would use under like circumstances, cannot recover for the

aggravation of his injuries accruing from such neglect: *Railway Co. v. McNamee*, 70 Tex. 74; compare *Brown v. Griffin*, 71 Id. 654. Intoxication does not excuse a man from the exercise of that care and prudence the want of which under other circumstances would constitute contributory negligence: *Missouri Pac. Ry Co. v. Evans*, 71 Id. 362.

CENTRAL CITY INSURANCE COMPANY v. OATES.

[86 ALABAMA, 558.]

INSURANCE—CONDITIONS AS TO NOTICE AND PROOF OF LOSS.—Stipulations in a fire insurance policy that the insured will forthwith give notice of loss, and render a particular and sworn account of such loss, accompanied with a magistrate's certificate thereof, are conditions precedent; and satisfactory evidence of compliance with them in proper time is an essential prerequisite to recovery, unless such compliance is waived by the insurer.

INSURANCE—CONDITION AS TO NOTICE OF LOSS.—Condition in a fire insurance policy that notice of loss must be given "forthwith" means that it must be given without unnecessary delay, or with reasonable diligence, under the circumstances of each particular case. Such condition is liberally construed in favor of the assured, and strictly against the insurer.

INSURANCE—CONDITIONS—PROOF OF LOSS—WAIVER.—Where a fire insurance policy requires preliminary proofs of loss, and they are presented in due time, but are defective, such defects may be waived by the failure of the insurer to object to them on any ground within a reasonable time, or by putting his refusal to pay on any other specified ground than defect in proofs.

INSURANCE—CONDITIONS—PROOF OF LOSS—WAIVER.—Where a fire insurance policy requires preliminary proofs of loss, the mere silence of the insurer, or his failure to specify the non-production of such proof as an objection to the payment of the loss, cannot be construed as a waiver of the presentation of such proof, defective or otherwise.

INSURANCE—PROOFS OF LOSS—WAIVER.—Where a fire insurance policy exacts notice of loss forthwith, and proof of loss as soon thereafter as possible, mere notice of loss is not proof of loss, nor a waiver thereof, though proof of loss "forthwith" may answer also as notice.

INSURANCE—PROOF OF LOSS—WAIVER.—Where a fire insurance policy requires that notice of loss must be given forthwith, and proofs of loss as soon thereafter as possible, and it is shown that the insurer received notice of loss, but never received the proofs of loss sent, or knew their contents and defects, if any, it cannot be contended that such proof or defects are waived.

INSURANCE—PROOF OF LOSS—WAIVER.—Under a fire insurance policy requiring proofs of loss rendered at the residence of the insurer, the deposit in the post-office of a written statement of loss, sworn to and addressed to the insurer, but never received by him, is not a delivery of such proof so as to fulfill the requirements of the policy and constitute a waiver of such proofs.

Tompkins, London, and Troy, and Pettus and Pettus, for the appellant.

Jones and Falkner, contra.

SOMERVILLE, J. The policy of insurance sued on, among other conditions, requires three important steps to be taken by the assured in the event of a loss by fire: 1. He must "forthwith give notice of said loss to the company in the city of Selma"; 2. "As soon after as possible [he must] render a particular account of such loss, signed and sworn to by him," the assured, stating the origin of the fire, what other insurance he has, if any, his interest in the property, its value, and by whom and for what purpose it was occupied; 3. He must produce the certificate of the nearest disinterested magistrate that such officer has examined the circumstances of the loss, and believes that it originated without fraud, and amounted to a specified sum. These three requirements, omitting for the present all mention of others, viz.: 1. Notice of loss; 2. Sworn proof of loss; 3. Certificate of loss by a magistrate,—have uniformly been held by the courts to be conditions precedent in policies of insurance like the present one, and satisfactory evidence of compliance with them in proper time has been held to be an essential prerequisite to the right of recovery by the assured, unless such compliance is waived by the insurer: *Wellcome v. People's Eq. Mut. Fire Ins. Co.*, 2 Gray, 480; *May on Insurance*, secs. 460, 466; *Fire Ins. Co. v. Felrath*, 77 Ala. 194; 54 Am. Rep. 58.

"Forthwith," in all such policies, means without unnecessary delay, or with reasonable diligence, under the circumstances of the particular case: *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; 49 Am. Dec. 74. It has been held in one case that delay of eleven days, and in another of eighteen days, in giving notice of loss, is not a compliance with such a requirement, in the absence of excusatory facts explaining the delay: *Trask v. State Fire and Marine Ins. Co.*, 29 Pa. St. 198; 72 Am. Dec. 622; *Edwards v. Lycoming Ins. Co.*, 75 Pa. St. 380. Where the fire occurred on the 15th, and the plaintiffs, hearing of it on the 18th, gave notice by mail on the 23d, this was held to be a sufficient compliance with a condition requiring notice to be given "forthwith": *New York Cent. Ins. Co. v. National Ins. Co.*, 20 Barb. 468. And notice given on the morning after the fire was held sufficient in *Hovey v. American Mut. Ins. Co.*, 2 Duer, 554. The settled rule in all cases, however, is to con-

true such requirements liberally in favor of the assured, and strictly against the insurer: *Piedmont & A. Ins. Co. v. Young*, 58 Ala. 476; 29 Am. Rep. 770; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467; 60 Am. Rep. 112.

It has been held by this and other courts that where preliminary proofs of loss are presented to the insurer in due time, and they are defective in any particular, these defects may be waived in either of two modes: 1. By a failure of the insurer to object to them on any ground within a reasonable time after receipt,—in other words, by undue length of silence after presentation; or 2. By putting their refusal to pay on any other specified ground than such defect of proof. The reason is, that fair dealing entitles the assured to be apprised of such defect, so that he may have an opportunity to remedy it before it is too late: *Fire Ins. Co. v. Felrath*, 77 Ala. 194; 54 Am. Rep. 58; *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9; *Insurance Co. v. McDowell*, 50 Ill. 120; 99 Am. Dec. 497; *St. Louis Ins. Co. v. Kyle*, 49 Id. 74; *Commonwealth Ins. Co. v. Allen*, 80 Ala. 571.

So there are cases decided by this and other courts which hold, and properly so we think, that an entire failure to make any formal proof of loss may sometimes be excused, on the principle of waiver or estoppel *in pais*. In *Martin v. Fishing Ins. Co.*, 20 Pick. 389, 32 Am. Dec. 220, no evidence was offered of any preliminary proofs before bringing the action, but only of an abandonment not accepted, and a demand of payment of the loss. The insurer refused to pay the loss, solely on account of the unseaworthiness of the vessel, and in all their communications with the plaintiff made no objection to the want of proof. The court held that the refusal to pay on the ground specified was a fact from which the jury were authorized to infer a waiver of the proof of loss. On like principle, a waiver of preliminary proofs has been inferred from a distinct refusal of the company to pay, because the assured had taken other insurance without notice, and "had in other ways acted unfairly": *Charleston Ins. Co. v. Neve*, 2 McMull. 237. And again, on the ground that no valid contract of insurance had ever been entered into, because incomplete at the time of the loss, no objection being made to the want of such proofs: *Taylos v. Merchants' Ins. Co.*, 9 How. 390; *Home Ins. Co. v. Adler*, 71 Ala. 518. So where the insurance company subjected the assured to a personal examination under oath, which statement he subscribed, as requi-

by the terms of the policy, and no demand was made for formal proofs, it was held that, upon this state of facts, the jury were authorized to find a waiver of such proofs: *Badger v. Phoenix Ins. Co.*, 49 Wis. 400. The payment by the insurer of a part of the sum agreed to be paid by the policy in case of loss has also been held a waiver of the usual preliminary proofs: *Westlake v. St. Lawrence Ins. Co.*, 14 Barb. 206; so, the offer to pay a specified sum, accompanied by a denial of liability for some of the articles as not covered by the policy, without demand of such proofs: *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571.

We can find no case, however, where the mere silence of the insurer has been construed as a waiver of the presentation of preliminary proofs by the insured, where no such proofs, defective or otherwise, have been presented. The policy itself is the most solemn notification possible of the imperative prerequisite of furnishing such proofs. It is there stipulated that they must be furnished as soon as possible after the fire, and this stipulation is a standing notice of the requirement. It stands to reason that this notice need not be reiterated by the insurer, nor any special attention of the assured called to it, unless the particular circumstances of the case render it necessary to fair and honest dealing between the parties. And the authorities accordingly hold that the mere silence of the underwriter or insurer, or his failure to specify the non-production of such preliminary proofs as an objection to the payment of the loss, is not sufficient evidence to justify a jury in inferring a waiver of the production: *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *O'Reilly v. Guardian Ins. Co.*, 60 N. Y. 169; 19 Am. Rep. 151; *Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 126. A like principle was applied in *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74, where there was a failure on the part of the insurer to object to a notice of loss when it was received too late. It was suggested by the court that it was not the duty of the company to make any formal objection to the want of notice, and whether they were silent or made objections on this ground could not alter the rights of the parties. "Such a doctrine would be in fact," it was said, "implying a new contract between the parties, from the mere inaction or silence of one party." See also *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; 80 Am. Dec. 197.

As we have said, the contract exacts,—1. A notice of loss forthwith; and 2. Proofs of loss as soon thereafter as possible. It is manifest that mere notice of loss is not proof of such loss,

and cannot ordinarily subserve such purpose; although proof of loss, if made "forthwith," may answer not only as proof, but as notice: Wood on Insurance, sec. 428; May on Insurance, sec. 460. It has been accordingly held, in recognition of this distinction, that there might be a waiver of the notice of loss without a waiver of the proof of loss required to be furnished: *Dealter v. State Mut. Ins. Co.*, 38 Pa. St. 130.

In this case there was notice of loss, but the company received no preliminary proofs. The policy required that such proofs should be rendered to the company, meaning, from the context, in the city of Selma, where the notice also was required to be given. The deposit in the post-office of a written statement of loss made out and sworn to, and addressed to the company at Selma, but never received by them, was not a delivery of such proof to them, and could not operate to fulfill the requirement of the contract that such proofs of loss should be rendered to the company at Selma: *Hodgkins v. Montgomery Co. Ins. Co.*, 34 Barb. 218.

Waiver is necessarily a matter of mutual intention between the contracting parties in the nature of a new contract between them. In the absence of evidence that the company had ever received any proofs of loss, or knew their contents and defects, if any, it cannot be contended that such defects were waived. There can be no waiver of anything as to the existence of which one is totally ignorant: *Bennecke v. Insurance Co.*, 105 U. S. 355.

In *Dawes v. North River Ins. Co.*, 7 Cow. 462, it was held that the president of an insurance company, as such, possessed no power to waive full preliminary proofs. In *Queen Ins. Co. v. Young*, 86 Ala. 424, it was decided that a local soliciting agent has no authority, after loss, to waive the breach of any condition in a fire insurance policy. And *Patrick v. Farmers' Ins. Co.*, 43 N. H. 641, 80 Am. Dec. 197, is authority for the proposition that a condition in a policy of insurance requiring notice of loss to be given within thirty days is not waived by a vote of the directors of the company to indefinitely postpone the consideration of the loss, which was tantamount to a refusal to pay anything on account of it, the notice not having been given in due time.

The jury were probably justified in coming to the conclusion that the notice of loss, under all the circumstances of the case, was given in a reasonable time, and in proper mode. But there were no proofs of loss furnished, and no conduct on the

company's part from which the jury were authorized to infer a waiver of such proof.

Under a proper application of the foregoing principles, it is our opinion that the defendant's demurrer to the plaintiff's replication should have been sustained, and that the defendant was entitled to have the general affirmative charge given as requested.

Reversed and remanded.

INSURANCE — PROOFS OF LOSS. — An insurance company is bound to point out the defects in proofs of loss, so as to afford to the insured all reasonable facilities for ascertaining what such defects are, and enable him to remedy them; and its refusal to do so is evidence for the jury, as tending to show a waiver of the defects in the proofs: *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598, and note 607. The condition requiring proofs of loss is waived by receiving proofs, and retaining them for five months without objection: *Commercial U. Assurance Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562, and note 565. The condition is regarded as waived as to proofs of loss, where the company fails to make objection within a reasonable time, or where the refusal to pay is based upon other grounds: *Firemen's Ins. Co. of Baltimore v. Floss*, 67 Md. 403; 1 Am. St. Rep. 398, and note 405. After an insurance company has itself taken cognizance of a loss, and prepared such proofs as it deems essential to an adjustment, the insurer may assume, until notified to the contrary, that additional notice and proofs are not required: *American Central Ins. Co. v. Sweetser*, 116 Ind. 370. A provision in a policy of insurance, that proofs of loss must be signed and sworn to by the assured, is sufficiently complied with where the assured is a copartnership, when they are signed and sworn to by one of the partners, unless objection is made at the time: *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176. An acceptance by a local agent of the insurer of the inventory of the lost goods without objection, his inspection and partial adjustment of the loss, and his offer to pay a sum certain in satisfaction of the claim for damage, will not constitute a waiver of the proof of loss required by the policy, if such agent at the time notified the insured that he expected and required such proofs of loss as were stipulated for by the contract of insurance: *Scottish Union etc. Ins. Co. v. Clancy*, 71 Tex. 5.

ULBRICHT v. EUFAULA WATER COMPANY.

[86 ALABAMA, 567.]

WATERCOURSES — DIVERSION — NUISANCE — INJUNCTION. — To divert or unreasonably obstruct a watercourse is a private nuisance, actionable at law, and in such cases equity will interfere by injunction to prevent irreparable damage and avoid a multiplicity of suits.

WATERCOURSES — RESERVATION OF RIPARIAN RIGHTS IN GRANT. — Where a grantor owning land on both sides of a river conveys to his vendee a portion of the land so situated for the purpose of enabling the latter to furnish water for a certain town, but reserves all easements and riparian rights in his other lands, including water rights and privileges, such

reservation retains in the grantor nothing which he would not have retained without it, the right of water being appurtenant to the land itself as part of the realty, and not affected by the conveyance.

WATERCOURSES — RIPARIAN RIGHTS. — Every riparian owner of land through which streams of water flow has a right to the reasonable use of the running water, which is a private right of property annexed and incident to the freehold, being a real or corporeal hereditament in the nature of an easement, and must be enjoyed with reference to similar rights of other riparian proprietors.

WATERCOURSES — RIPARIAN RIGHTS. — Every riparian owner has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity, or alteration in quality, with the limitation that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes.

WATERCOURSES — RIPARIAN RIGHTS. — The diversion of water from a stream by a riparian owner for the purpose of supplying the wants of a neighboring town, without restoring it to its natural channel where it is accustomed to flow, is a wrongful act, for which an action will lie by a lower riparian owner, without proof of special damage, but he is entitled to recover only nominal damages, unless he shows affirmatively that he has suffered some special damage.

WATERCOURSES — RIPARIAN RIGHTS — INJUNCTION. — Where the grantee, an upper riparian owner, acquired his lands of the grantor, the lower riparian proprietor, for the express purpose of supplying a neighboring town with water without returning it to the stream, and it appears that the grantor is taking no advantage of his usufructuary right, but allows the water to flow by unutilized, it appearing to be of no special value to him, he is entitled to an injunction for the wrongful diversion, only so far as it is necessary to vindicate his right, and prevent the loss of it, by adverse user and lapse of time.

A. H. Merrill, for the appellant.

G. L. Comer, *contra*.

SOMERVILLE, J. The purpose of the bill, which was filed by the complainant, *Ulbricht*, is to enjoin the appropriation of the water from a running stream, diverted by the defendant corporation for the use of its water works, constructed to supply the inhabitants of the city of *Eufaula*. The complainant owns land on both sides of this watercourse, and so does the defendant, each being a riparian proprietor. The grievance complained of is, that the defendant, an upper riparian owner, by the construction of a dam and a reservoir, and the diversion of so large a quantity of the running stream, is guilty of an unlawful act, prejudicial to the rights of the complainant as a lower riparian owner on the same stream.

The testimony fully establishes the diversion of the water for the purpose mentioned, resulting in a sensible diminution

in the flow of the stream, at least in the dry season, or summer months. It further shows, however, that the complainant was making no particular use of the stream, having no mill or other industry on it, and therefore that he suffered no special damage by the act of defendant.

The chancellor was of opinion "that the owner below ought not to be permitted by injunction to hinder the owner above from the consumption of water which the former cannot and does not use." An injunction was nevertheless granted, "perpetually restraining the defendant from the consumption of the whole or any part of said stream, for the use of said water-works in supplying the city, to the sensible injury or damage of the complainant, for any purpose for which he may now or in the future have use for said water." The defendant was also enjoined from backing any portion of the water of the stream on the lands of the complainant to an extent damaging to him. The chancellor admitted the right of the complainant, also, to prevent the defendant from so using the water as to acquire an easement by an adverse user of any or all the water of the stream for supplying said water-works; and the complainant is declared to be entitled to the reasonable use of the flowing waters of said stream, as against the defendant, whenever he shall need it.

It is our opinion that there is no error in this decree, and that it secures to the complainant all to which he is equitably entitled in this suit.

1. To divert or unreasonably obstruct a watercourse is a private nuisance actionable at law. The jurisdiction of equity to interfere in such cases, by injunctive relief, to prevent irreparable damage, and avoid a multiplicity of suits at law, is clear and well-established, the remedy at law being deemed inadequate: *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; 3 Pomeroy's Eq. Jur., sec. 1351; *Gardner v. Newburgh*, 7 Am. Dec. 526; *Lawson v. Menasha Co.*, 48 Am. Rep. 528; Gould on Waters, sec. 215.

2. The complainant is shown to have sold to the defendant the acre of land upon which the reservoir and dam were constructed for this specific purpose, reserving to himself all easements and riparian rights in the other lands owned by him, including the water rights and privileges. This reservation retained in the grantor nothing which he would not have retained without it, as the right of water in the other land was appurtenant to the land itself as a part of the realty, and

could not have been affected by the conveyance to defendant: *Cary v. Daniels*, 41 Am. Dec. 532, 538.

3. There is no principle of law better recognized than that every riparian owner of lands through which streams of water flow has a right to the reasonable use of the running water, which is a private right of property. The right is one annexed and incident to the freehold, being a real or corporeal hereditament in the nature of an easement, and must be enjoyed with reference to the similar rights of other riparian proprietors. It is therefore a qualified, and not an absolute, right of property: *Gardner v. Newburgh*, 2 Johns. Ch. 161; 7 Am. Dec. 526, and note 531-534; Angell on Watercourses, sec. 5; Tiedeman on Real Property, sec. 614; *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391; Boone on Real Property, sec. 141.

4. The general rule is often stated to be, that every riparian proprietor has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality. But this rule is qualified by the limitation, now well recognized, that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes; or to state the rule in the words of Shaw, C. J., in *Cary v. Daniels*, 8 Met. 477, 41 Am. Dec. 532: "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below." We will not enter into a general discussion of this phase of the case, as it is not necessary to a decision of the question before us. It is exhaustively discussed in the following authorities, which we cite merely, without review: *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Stein v. Burden*, 24 Ala. 180; 60 Am. Dec. 453; *Davis v. Getchell*, 52 Me. 602; 79 Am. Dec. 636, and note 638-645; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191; 57 Am. Dec. 85; *Crooker v. Bragg*, 10 Wend. 260; 25 Am. Dec. 555; Gould on Waters, secs. 213-215.

5. In this case, the defendant has diverted the water from the stream, and consumes it for the purpose of supplying the wants of a neighboring town. The diversion is rendered unlawful by the fact that it is for an extraordinary or artificial use, and is not restored to its natural channel, where it is ac-

customed to flow. The authorities speak with one voice in sustaining the proposition that no person has a right to cause such diversion, and that it is a wrongful act, for which an action will lie by the lower riparian proprietor without proof of any special damage. The injury done the complainant in such a case is an invasion of his general right to have the watercourse flow in its natural channel, through his lands, operating to interrupt a possible water power, or to suspend an agency capable of imparting fertility to the soil through which it passes, or other damage of a general character: *Parker v. Griswold*, 17 Conn. 288; 42 Am. Dec. 739. In all such cases, however, the plaintiff can recover nothing more than nominal damages, unless he shows affirmatively that he has suffered some special damage. The case of *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394, may be considered as settling this particular question, having been before this court on three separate appeals: *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; 27 Ala. 104. It was decided in these cases that a riparian proprietor is entitled to nominal damages for any disturbance of his right by diversion of the waters from the stream without returning them to the natural channel, although he offers no evidence of actual or special damage. The diversion there, as here, was for the purpose of supplying the inhabitants of a neighboring city (Mobile) with water through the medium of a system of water works. "The law," it was said by Goldthwaite, J., "in the absence of any special injury, gives nominal damages [for the invasion of every legal right], on the ground that the undisturbed enjoyment or continuation of such acts, without the consent of the owner, would ripen into evidence of a right to do them": 24 Ala. 130; 60 Am. Dec. 453, 457.

The action is allowed, as said in *Newhall v. Iveson*, 8 Cush. 595, 54 Am. Dec. 790, "to vindicate the plaintiff's right, and to prevent a loss of it by adverse possession and lapse of time." The cases are numerous in support of this view, and of the reasons upon which such decisions are made to rest. As said in *Parker v. Griswold*, 42 Am. Dec. 746: "They proceed upon two grounds: 1. That every injury, from its very nature, legally imports damage; and 2. That an injury to a right is a damage to the person entitled to that right, by jeopardizing its continuance, and leading to its very destruction." In other words, the license to interrupt the right, if acquiesced in for twenty years, would become conclusive of

its reduction by the complainant, by presumed grant or otherwise, under the doctrine of prescription, the defendant's exercise of it being regarded as conclusively adverse, and as having ripened into a good title by lapse of time. The mere non-user of a water power by a riparian owner will not operate to impair his title, or confer any right thereto on another. He has a legal right to have the stream to continue to flow through his land, irrespective of whether he may need it for any special purpose or not. This principle we fully recognize: *Garwood v. New York Central R. R. Co.*, 83 N. Y. 400; 38 Am. Rep. 452; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Blanchard v. Baker*, 23 Am. Dec. 504; *Gardner v. Newburgh*, 2 Johns. Ch. 161; 7 Am. Dec. 526, note 532; *Plumleigh v. Dawson*, 41 Am. Dec. 199; *Cary v. Daniels*, 41 Id. 532; *Dilling v. Murray*, 63 Id. 385.

6. If the complainant had made proof of the fact that he had suffered any special perceptible damage by the diversion of the water in question, or that he was making any use of it, or that it was of any particular value to him, we may admit, for the sake of argument, that, irrespective of any question of estoppel which we do not consider, he would be entitled to an injunction perpetually restraining the defendant from a continuance of his wrongful act of diversion: *City of Emporia v. Soden*, 37 Am. Rep. 265; *Garwood v. New York Cent. R. R. Co.*, 38 Id. 452; Gould on Waters, sec. 214. But inasmuch as he is taking no advantage of his usufructuary right, but allows the water to flow by unutilized, and it appears to be of no special value to him, he will not be permitted to call for equitable interference in his behalf further than to vindicate his right, and prevent a loss of it by adverse user and lapse of time. A court of equity will use its discretion, in such case, not to interfere by injunction, but leave the complainant to his remedy at law: *Smith v. City of Rochester*, 92 N. Y. 463; 44 Am. Rep. 393, 405; *Corning v. Troy Nail Factory*, 40 N. Y. 220, per Woodruff, J.; *Clinton v. Meyers*, 11 Am. Rep. 373, 379.

In *Garwood v. New York Cent. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, the bill was filed to prevent a railroad company, as riparian owner, from diverting water of a running stream by pipes and reservoirs, for the use of its locomotive-engines, to the detriment of a lower proprietor, who was a mill-owner, and who claimed that the diversion diminished the grinding power of his mill. The defendant was restrained

only "from diverting the water to the injury of the plaintiff." Upon appeal by the plaintiff, the judgment was affirmed by the New York court of appeals: See also *Earl of Sandwich v. Great Northern R. R. Co.*, L. R. 10 Ch. Div. 707. The principle of this and other analogous decisions is, that the extraordinary process of injunction will be used by the court of chancery only so far as it is necessary to vindicate or enforce valuable rights of parties litigant, and will ordinarily not be allowed where the injury sought to be restrained is only trivial in its nature.

It is our opinion that the aid of injunctive relief was carried by the chancellor's decree as far as it ought to be, in view of the facts of this case. It fully protects the complainant from injury, present and future, resulting from the use of the water by the defendant, — a privilege of inestimable value to defendant, and of no special value to the complainant. The granting of the injunction in the broad terms asked would be of great inconvenience, and even injury, to the defendant, without being of any corresponding benefit to complainant.

The decree is affirmed.

WATERCOURSES — IRRIGATION. — The common-law doctrine giving the riparian owner a right to the flow of a stream in its natural channel upon and over his lands, even though he makes no use of it, is inapplicable in Colorado; and in that state the appropriator of the water of a stream for irrigation purposes acquires a prior right thereto as against the riparian owner along the stream who obtained his patent for the land after the appropriation for irrigation purposes was made: *Hammond v. Rose*, 11 Col. 524; 7 Am. St. Rep. 258; and such is rule in most of the Pacific coast states: *Wheeler v. Northern etc. Co.*, 10 Col. 582; 3 Am. St. Rep. 603, and note 615; *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, and note 797. An upper riparian proprietor has no right, for irrigation purposes, to take all the water which flows in the stream at the point of diversion for that purpose; he can only take the water entirely away from the stream when the whole is absolutely necessary for strictly domestic purposes, and to furnish drink for man and beast; and he cannot irrigate non-riparian lands, and must see that all surplus water is returned to the stream: *Gould v. Stafford*, 77 Cal. 66.

RIPARIAN RIGHTS. — A riparian proprietor is entitled to an injunction restraining the unlawful diversion of the waters of a stream, although the injury caused thereby is incapable of ascertainment, or of being computed in damages: *Heilbron v. Fowler etc. Co.*, 75 Cal. 426; 7 Am. St. Rep. 183, and note 189.

RIPARIAN OWNERS ALL HAVE THE RIGHT AT COMMON LAW TO THE REASONABLE USE OF THE WATERS OF A STREAM: Note to *Jones v. Adams*, 3 Am. St. Rep. 797. The owner of land on a natural watercourse has the right to the usual flow of water without obstruction, and the owner above cannot, in protecting his own land from injury, cut off the water of the stream from flowing to the land below; he can protect himself so long as he does not in-

terfere with the flow of the water in the channel: *Bliss v. Johnson*, 76 Cal. 337. An unlawful diverter of the waters of a natural stream cannot escape from liability to a riparian proprietor for his wrongful acts by showing that other persons were making similar unlawful diversions: *Heilbron v. Kings River & Canal Co.*, 76 Cal. 11. But as to waters flowing in artificial channels, compare the case of *Green v. Carotta*, 72 Ill. 257.

HURST v. STATE.

[85 ALABAMA, 604.]

CRIMINAL LAW — CONVICTION OF ONE CRIME AS BAR TO PROSECUTION FOR ANOTHER. — A conviction for conveying into a county jail a file, with intent to facilitate the escape of a prisoner charged with misdemeanor, is a bar to conviction for the same act of conveying the same file into the same jail, with intent to liberate a prisoner confined therein on a charge of felony. In such case the state may elect to prosecute for the higher grade of crime, — the attempt to liberate the felon.

W. A. Gunter and E. P. Morrisett, for the appellant.

W. L. Martin, attorney-general, contra.

SOMERVILLE, J. The defendant was indicted, tried, and convicted for conveying into the county jail a file, with the intent to facilitate the escape of one Hurst, who was confined under a charge of misdemeanor, — the offense being made punishable by fine and imprisonment in the county jail, or sentence to hard labor for the county: Code 1886, sec. 4003. At the same term of the court the defendant was also indicted, tried, and convicted for the same act of conveying into the county jail the same file, with the intent to facilitate the escape of one Hughes, a prisoner confined in the same jail on a charge of felony, — this offense being punishable by imprisonment in the penitentiary: Code 1886, sec. 4002. The latter case is the one now before us on appeal.

The defendant, on the latter trial, set up as a defense the conviction in the former case, which plea of *aut refois convict*, on demurrer by the state, was held to be insufficient. It appears, from the evidence, that the same act aided both prisoners to escape, and their escape was effected at the same time. The question is, whether the defendant is guilty of two separate indictable offenses, each of which may be made the basis of an independent prosecution and conviction.

Our constitution, following the parallel principle of the common law, provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb," — a safe-

guard of liberty which, under our Anglo-American system of jurisprudence, has always been regarded by our courts with a sanctity scarcely second to that accorded to the right of trial by jury. The purpose of the courts should be so to apply this constitutional guaranty as to protect the citizen from vexatious criminal prosecutions, and at the same time not to defeat the chief design of our penal laws, which, apart from their reformatory aspect, have in view the double aim of protecting society and preventing crime.

If we hold this plea of former conviction to be bad, we can see no reason why a defendant could not be indicted and convicted one hundred times in case he should, by a single act effect the simultaneous escape of a hundred prisoners lawfully confined in a county jail or other prison. It is the familiar case of a single criminal act producing several different results, each of which, standing alone, and dissociated from the others, would have been an indictable crime. Is each result a separate and distinct crime, liable to be indicted as such? or is it a mere consequence of a single unlawful act done with criminal intent?

An analogous inquiry would be, If one should cast a stone into a crowd, and wound a dozen men at one blow, is he liable to one or a dozen indictments? If he burns a hundred houses by one act of arson, knowing the probable consequences of his unlawful act, would he be guilty of a hundred crimes? or should he blow up a hotel with dynamite, murdering a thousand guests, would he be separately triable for the perpetration of a thousand homicides?

The authorities are in direct conflict on this subject, and we shall make no effort to reconcile them. It is our judgment that none of the legitimate purposes of punishing crime require the adoption of the policy of multiplying prosecutions in cases of this nature. Such, in fact, seems to be the policy of our legislation as to framing indictments, as declared by section 4384 of our Penal Code. It is there provided that "when an act is criminal, if producing different results, such results may be charged in the same count, in the alternative": Code 1886, sec. 4384; Code 1876, sec. 4797. It has often been decided that a single crime cannot be split up or subdivided into two or more indictable offenses. As said in *Moore v. State*, 71 Ala. 307: "A series of criminal charges cannot, under our system of jurisprudence, be based on the same offense or criminal act, at least as concerns the dignity of the same sover-

eighty. If the state elects, through its authorized officers, to prosecute a crime in one of its phases or aspects, it cannot afterwards prosecute the same criminal act under color of another name."

It is accordingly held by the great preponderance of authority that the stealing of several articles at the same time and place, although they belong to different owners, constitutes but a single indictable crime, and can be prosecuted as such but once. "An indictment," says Mr. Freeman, "could not be found for the larceny of one of the articles, and after the verdict another indictment sustained for the stealing of the remaining articles. Indeed, to put such a power in the hands of the prosecuting attorney would be to render the salutary doctrine of prior jeopardy in many instances practically nugatory": *Roberts v. State*, 58 Am. Dec. 539, note, and cases cited; *Quitow v. State*, 28 Am. Rep. 396, and cases cited.

In *Oleson v. State*, 20 Wis. 58, a count of an indictment was held good which charged the defendant with aiding the escape of two prisoners by a single act, although the prisoners were confined under charges of different grades, and the act of aiding the escape of one of the prisoners was punishable more severely than that of aiding the escape of the other. This decision can rest only on the theory that the two escapes resulted from but one criminal act.

In *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464, the indictment charged the burning of a number of houses, belonging to different owners, by a single act, at one time and place. It was held to charge but one offense, and not therefore bad for duplicity, the court observing as follows: "A conviction upon separate indictments could not be had for each separate house, although an indictment may have been good for any one of them, and a conviction or acquittal upon such an indictment would be a bar to an indictment for burning any other house burned by the same act. These consequences must follow from the position that there was but one crime committed in respect to all the dwelling-houses, and that the respective counts charge but one crime." To the same effect precisely is the English case of *Regina v. Trueman*, 8 Car. & P. 727, where the burning of five houses, belonging to different persons, was held to be but one transaction, and indictable only as a single felony.

In *Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234, a count in an indictment charging the administering of poison to three dif-

ferent persons by one act was held to be good as charging but a single offense.

So it has been held that a libel on two distinct persons, by one act, may be charged in the same count: *Rex v. Benfield* 2 Burr. 980; Wharton's Criminal Pleading, sec. 254.

In *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369, where the same act of unlawful shooting resulted in the death of two persons, it was held that acquittal or conviction on a trial for the murder of one would be a good defense on a second trial for the alleged murder of the other. The killing, it was said constituted but one crime, and "the state cannot divide that which constitutes but one crime, and make the different parts of it the bases of different prosecutions."

In *State v. Damon*, 2 Tyler, 387, it was held by the supreme court of Vermont that where one blow produces two separate assaults and batteries on different persons, a conviction of the one may be pleaded in bar to an indictment for the other.

In *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490, it is held that a defendant's acquittal of the crime of arson, which resulted in the unintentional destruction of the life of a human being, was a good defense, under the plea of *autrefois acquit*, to an indictment charging him with the murder of the same person whose life was destroyed by the act of arson. It was said by the court that a defendant could not lawfully be punished for two distinct felonies growing out of the same identical act, and where one is a necessary ingredient of the other. Where the state has selected and prosecuted one of the crimes to conviction, it was said to present "a proper case to interpose the benign principle that a man shall not be twice put in jeopardy for the same offense in favor of the life of the defendant."

In *State v. Lewis*, 2 Hawks, 98, 11 Am. Dec. 741, where two indictments were found against a defendant, one for burglary and larceny, and the other for robbery, based on the same transaction, it was held that a conviction of larceny under the first was a bar to a trial for robbery under the second.

We might add to this opinion many other decisions of like import to those above cited, but deem it unnecessary. So there are other adjudications holding to the opposite doctrine: *State v. Nash*, 86 N. C. 650; 41 Am. Rep. 472, note 475; *State v. Elder*, 32 Am. Rep. 69; *Ben v. State*, 58 Am. Dec. 240, 242, note; *Teat v. State*, 24 Am. Rep. 708; *Roberts v. State*, 58 Am. Dec. 539, 540, note; Wharton's Criminal Plead-

ing, sec. 470. Some of the modern decisions make a distinction between cases where the two pleas of *autrefois acquit* and *autrefois convict* are interposed, which seems to be supported by sound reason; but this we do not stop to discuss: *Simco v. State*, 9 Tex. App. 348; *Roberts v. State*, 58 Am. Dec. 547, 548. The case of *State v. Standifer*, 5 Port. 223, does not necessarily conflict with the views above expressed. See also *State v. Johnson*, 12 Ala. 840; 46 Am. Dec. 284; *Gordon v. State*, 71 Ala. 315; *Fiddler v. State*, 7 Humph. 508.

In the case at bar the gist of the offense charged is the act of carrying the file into the jail with the criminal intent of aiding certain prisoners to escape. This intent was compound, being more or less aggravated, according to the nature of the crime with which the escaping prisoners were charged. It was competent for the state to elect to prosecute for the higher grade of the crime,—the aiding of the one to escape who was charged with felony. The prosecutor, in the language of Mr. Bishop, "may carve as large an offense out of the transaction as he can, but he must cut only once": 1 Bishop's Crim. Law, sec. 1060.

The principle of the foregoing decisions, in our judgment, supports the sufficiency of the plea of former conviction. It follows that the court erred in sustaining the demurrer to this plea.

The judgment will accordingly be reversed, and the cause remanded.

BROWN, C. J., dissented, and said: "Crime consists of an evil intent carried into effect, or attempted to be carried into effect, by a single act, or series of connected acts, having that object in view. When the evil intent has but a single object, and the act done, or attempted, is confined in its purpose to that object, then, though they may by misadventure produce more than one result, each of which separately considered is a crime, only one crime is committed, and only one conviction can be had. When, however, the offender is influenced by more than one independent evil intent aimed at the accomplishment of different objects or criminal results, then a single act done, or attempted in pursuance thereof, may amount to more than one indictable offense. If not, the slayer of a multitude with dynamite or with a Gatling gun is, in the eyes of the law, no more guilty than the murderer who kills his single victim. If the offender in this case intended to liberate more prisoners than one, then I am not able to perceive any violation of the constitution in holding him criminally accountable for each separate prisoner he set at liberty"; citing 4 Am. & Eng. Ency. of Law, 790.

CRIMINAL LAW — FORMER CONVICTION. — The conviction for a felony, when bars other prosecutions: See monographic note to *Orenshaw v. State*, 17 Am. Dec. 791-796. What facts sustain a plea of former acquittal or convic-

tion: See monographic note to *Roberts v. State*, 58 Am. Dec. 536-549. Conviction or acquittal for a lesser offense, when a bar to a prosecution for the greater offense in which it is embraced: Note to *State v. Littlefield*, 35 Am. Rep. 339-345.

COOPER v. STATE.

[38 ALABAMA, 610.]

CRIMINAL LAW—EVIDENCE TENDING TO CRIMINATE.—Prisoner need not give nor exhibit evidence which tends to criminate him; and his refusal to do so cannot be taken as a circumstance against him. Thus the prisoner's refusal to make foot-prints, under a promise of release if the tracks, when made, did not exactly correspond with those of the suspected party, cannot be used against him.

R. H. Fries and J. G. Crews, for the appellant.

William L. Martin, attorney-general, for the state.

STONE, C. J. The prisoner was arrested on a charge of burglary, without a warrant, by the proprietor of the dwelling alleged to have been burglariously entered. The burglar had been discovered at a late hour of the night, walking within the house, and in his stocking-feet. Being pursued, he fled, and made his escape. The night was rainy, and the ground muddy. Escaping, the burglar ran across the hallway, which had a linen covering on the carpet. On this covering were left foot-stains, those made by the left foot being peculiar, and different from those made by the right. This was the testimony of the prosecuting witness. He testified further as follows: "I then told him, if he would take off his shoes, and wet his socks, and make tracks on the linen-cloth carpet-cover in the hall, if his tracks did not correspond in every particular with the tracks made by the burglar, I would release him. This he declined to do." The defendant asked the court to charge the jury that "the refusal of the defendant, if proven, to show a deformed foot to [the person who arrested him], on the night of the arrest, cannot be considered as a circumstance against him, and such evidence is excluded from your consideration." This charge was refused, and defendant excepted.

Our constitution (art. 1, sec. 7) declares that the accused "shall not be compelled to give evidence against himself." The principle of this clause is common to the constitutions of this country. It doubtless had its birth in the abhorrence with which confessions, coerced by inquisitorial torture, were

regarded alike in England and America. Courts have differed very widely in its interpretation. Perhaps its most learned and exhaustive discussion will be found in the able opinion of Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. 616. In the case of *Stokes v. State*, 5 Baxt. 619, 80 Am. Rep. 72, the precise question we have in hand was presented, with the single exception that, in that case, the offer was made to the prisoner that he should make a track with his bare foot in the presence of the jury. The prisoner declined to do so. The trial court permitted this offer to be made in the presence of the jury, against the objection of the accused; but instructed the jury not to regard the prisoner's refusal as evidence against him. The revising court, considering the case, said: "Because of this offer of the attorney-general [the prosecuting attorney, who had made the offer to the prisoner], and the assent of the court thereto, this cause is reversed and remanded. In the presence of the jury, the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to be brought before the jury, and the defendant asked to put his foot in it. We are satisfied the jury was improperly influenced thereby. And it is no sufficient answer that the judge afterwards told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him."

The principle of the decision from which we have quoted is, that it would have been unlawful to force the witness to give (or make) evidence against himself, and the plan adopted and permitted accomplished the same result by indirect means. Thus regarded and considered, it is difficult to perceive a difference in its hurtful bearing between making the offer in the court-room before the jury and proving by a credible witness that it had been unsuccessfully made outside of the court-room. See, on this subject, *State v. Jacobs*, 5 Jones, 259; *Doyme v. State*, 63 Ga. 669; *Blackwell v. State*, 3 Crim. Law Mag. 393; *People v. McCoy*, 45 How. Pr. 216.

There are a few authorities which differ from the views expressed above, of which possibly the most noted is *State v. Garrett*, 71 N. C. 85; 17 Am. Rep. 1.

Our own rulings on this and cognate questions may be found in *Bowles v. State*, 58 Ala. 835; *McAdory v. State*, 62 Id. 154; *Williams v. State*, 81 Id. 1; *Chastang v. State*, 83 Id. 29; *Kelly v. State*, 72 Id. 244; *Campbell v. State*, 55 Id. 80. The following authorities shed light on confessions, express or

implied: 3 Am. & Eng. Ency. of Law, 492, note 2; *Kelley v. People*, 55 N. Y. 565; *State v. Pratt*, 20 Iowa, 267; *Commonwealth v. Kenney*, 12 Met. 235; 46 Am. Dec. 672.

There was no error in receiving the prisoner's answer, as to the number of toes on his feet.

In receiving evidence of the offer made to the prisoner to make tracks with his stockinged foot, and his reply and conduct consequent thereon, the criminal court erred.

Reversed and remanded.

CRIMINAL LAW — EVIDENCE. — An accused, by voluntarily offering himself as a witness in his own behalf, waives his constitutional privilege of refusing to answer a question because it might tend to convict him: *State v. Thomas*, 98 N. C. 599; 4 Am. St. Rep. 351, and note 356.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CHICAGO CITY RAILWAY CO. v. ROBINSON.

[127 ILLINOIS, 2.]

NEGLECT. — **THE FACT THAT ONE PASSING FROM A SIDEWALK CROSSING** in a city stops upon the track of a street railroad, without first looking to see whether a car is approaching or not, is not, as a matter of law, negligence, whether the cars accustomed to run on such track are horse-cars or grip-cars. The question whether the sufferer was negligent must be determined by the jury in such case with regard to all the surrounding circumstances, and his conduct cannot be said, as a matter of law, either to be negligent or to be free from negligence.

NEGLECT IN RUNNING TRAINS IN OPPOSITE DIRECTIONS. — If car-tracks are in close proximity, to run a car or train of cars in one direction at rapid speed, and without signal or warning, over a sidewalk crossing, while another car or train bound in the opposite direction is discharging passengers at such crossing, and where the view of the approaching train is obstructed by the standing car from which the person injured has just alighted, this conduct fairly tends to prove culpable negligence on the part of the railway corporation, even though the rate of speed of the approaching train does not exceed that which is permitted by ordinance.

CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PARENTS OF A CHILD INJURED by a railway will not preclude a recovery for such injury, if the child himself was using all the care which the occasion required.

ACTION by Mary Robinson to recover from the Chicago City Railway Company for the death of a child of which she was administratrix. Judgment in favor of plaintiff in the trial court was affirmed by the appellate court.

Haynes and Dunne, for the appellant.

Smith and Helmer, for the appellee.

BAKER, J. In this case, appellee, as administratrix of her intestate, a boy some six years old, recovered judgment in the Cook circuit court for fifteen hundred dollars damages against appellant for wrongfully causing the death of such intestate, through the negligence of its servants. The judgment was affirmed in the appellate court for the first district.

Two grounds are urged in this court for the reversal of the judgment. One is, the refusal of the trial court, when the plaintiff below rested her case in chief, to instruct the jury to find for the defendant, because there was no evidence of negligence on the part of defendant, and no evidence of due care on the part of the plaintiff. We cannot accede to either of the propositions involved in the motion that was made by appellant. It is only when the conclusion of negligence necessarily results from the statement of fact that the court can be called upon to say to the jury that a fact establishes negligence, as a matter of law: *Chicago etc. R. R. Co. v. O'Connor*, 119 Ill. 586. The fact that a person passing over a sidewalk crossing in a city steps onto the track of a street railroad, whether the cars accustomed to run thereon are horse-cars or grip-cars, without first stopping and looking to see whether a car is approaching, is not, as matter of law, and without any regard to surrounding circumstances, negligence and a want of ordinary care. The question of negligence and a want of ordinary care, is in such cases, a question of fact for the determination of the jury, in the light of the attendant circumstances.

Where street-car tracks are in close proximity, to run a car or train of cars in one direction at rapid speed and without signal or warning over a sidewalk crossing, while a car or train bound in the opposite direction is discharging passengers at such crossing, and where, as in this case, the view of the approaching train is obstructed by the standing car from which the person injured has just alighted, is surely conduct which fairly tends to prove culpable negligence, even though the rate of speed of such approaching train does not exceed that which is permitted by ordinance, and it cannot be said, as matter of law, that such conduct is not negligence. From the testimony for appellee contained in this record, we think it was not manifest error to deny the motion of appellant to take the case from the jury.

It is urged that the first instruction for appellee was erroneous, in that it contained no reference to the element of con-

tributory negligence on the part of the mother of the deceased child. The theory of the instruction was, that the child himself was in the exercise of ordinary and reasonable care at the time he was killed. Several of the instructions given at the instance of appellant were predicated upon the same theory of fact that lies at the foundation of this instruction in question,—i. e., that the deceased was capable of exercising ordinary care and prudence,—and said instructions stated fully the duty thereby incumbent upon deceased in that regard. The jury, in returning a verdict for appellee, under the instructions of the court, must necessarily have found that the child was in the exercise of ordinary care and prudence. In such state of the case,—and it is the case stated hypothetically in the instruction,—it would be a matter of no moment, in respect to the liability of appellant, what degree of care and vigilance the mother was exercising for the safety of her child, since the child himself was using all the care which the occasion required. In a case where the conduct of an infant would not be negligence in an adult, the question of imputable negligence is immaterial: *Cummings v. Brooklyn City R'y Co.*, 104 N. Y. 669. The view that the minor did not use and was incapable of exercising care, by reason of his tender years and immature judgment, and that in the event the jury so found, the doctrine of imputable negligence, on account of the neglect of the mother, was applicable to the case, was fully given to the jury in instructions tendered by appellant. Appellee made no claim at the trial that the age of the deceased would excuse in him conduct which would be negligence in a person of mature judgment; and as the case went to the jury upon the instructions, the issue was conceded to appellant, without the jury found, from the evidence, that the child was in the exercise of ordinary care at the time he was killed. We think the instruction complained of was not erroneous.

The judgment of the appellate court is affirmed.

REMARKS, WHEN A QUESTION OF FACT FOR THE JURY, and when of law for the court: *East Line etc. R'y Co. v. Scott*, 71 Tex. 703; 10 Am. St. Rep. 804, and note. Where plaintiff's evidence tended to show that the grating, which hung on hinges, and was thrown back against the building when coal was being delivered, when so thrown back was dangerous, and liable to inflict injury upon those handling the coal, unless it was securely fastened, and that the appliances furnished by the city for that purpose were wholly inadequate, the question as to the negligence of the city was one for the jury: *Galea v. Mayor etc. of New York City*, 112 N. Y. 223. Compare *Geitz v. Milwaukee etc. R'y Co.*, 72 Wis. 307, where the contributory negligence of

the plaintiff was held to be a question for the jury. But in an action for negligence, when the question arises whether the act complained of was the proximate or the remote cause of the injury, if the facts are undisputed, the question is one of law for the court; otherwise, it is one of fact for the jury: *West Mahanoy Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604.

CONTRIBUTORY NEGLIGENCE — PARENT AND CHILD. — It is not negligence, as a matter of law, for parents to let a bright four-and-a-half-years-old boy, living in a large city, with no other place of amusements, to go out into the streets to play, under proper instructions and directions, but whether they were guilty of negligence, under the particular circumstances, is a question of fact for the jury: *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504. But a father knowingly permitting his child seven years old to go alone upon a railroad track to pick up coal, where trains frequently pass, is guilty of culpable negligence: *Pratt Coal and Iron Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751. Compare *Bliss v. Inhabitants of South Hadley*, 145 Mass. 91; 1 Am. St. Rep. 441, and note 442.

CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PARENT, WHETHER IMPUTED TO THE CHILD: See note to *Pratt Coal and Iron Co. v. Brawley*, 3 Am. St. Rep. 754.

HORSE AND DUMMY RAILROAD CO. v. DONOGHUE.

[127 ILLINOIS, 27.]

ASSESSMENT. — COURT OF EQUITY CANNOT REVIEW the action of an assessor or board of equalization in making an assessment, unless it can be shown that the assessment was fraudulently made, or that the property assessed was not liable to taxation, or that the legislature has, in authorizing the tax, disregarded or transcended the principles of equality, or that a tax has been levied when not authorized by law.

AN ASSESSMENT IS NOT SHOWN TO BE FRAUDULENT by proving that the committee of assessment promised an attorney, who appeared before them and made a statement with respect to the property to be assessed, that if they were not satisfied with his statement that they would notify him if they intended to make any assessment, and that they subsequently did make such assessment without complying with their promise.

BILL in equity against a tax collector to enjoin the collection of a tax. Decree for the defendant.

Bull and Strawn, for the appellant.

Maloney and Stead, for the appellee.

By COURT. This was a bill in equity, brought by the La Salle and Peru Horse and Dummy Railroad Company against the collector of taxes of the town of La Salle, in La Salle County, to enjoin the collection of a tax assessed by the state board of equalization on the capital stock of complainant for the year 1884. The complainant returned its capital stock

as being of no value, but the state board assessed the capital stock at five thousand dollars.

It is claimed that the capital stock was of no value; but if that be true, and the state board committed an error of judgment in making the assessment, that affords no ground for relief in a court of equity. When the power has been conferred upon a person or a board to make an assessment, and in the exercise of that power a greater value has been placed on certain property than should be placed upon it, a court of equity has no power to review the action of the assessor, and correct an error of that character. The rule well established is, that the action of the assessor is final, unless it can be shown that the assessment was fraudulently made, or that the property assessed was not liable to taxation, or the legislature has, in authorizing the tax, disregarded or transcended the principles of equality, or where a tax has been levied when not authorized by law: *Republic Life Ins. Co. v. Pollak*, 75 Ill. 294. The facts presented by this record do not, in our opinion, bring the case within any of the exceptions stated above.

As bearing upon the question of fraud, it was proven on the hearing that complainant sent an attorney to Springfield while the state board was in session, who appeared before the committee on the assessment of capital stock of corporations, and stated to the committee that the object for which the enterprise had been incorporated had proven an entire failure; that the capital stock was of no value, and the debts of no value, except to the extent of the tangible property, which had already been assessed at its full market value. The attorney also stated that if the committee was not satisfied with the statement made, he desired a committee to be sent to La Salle for the purpose of making an examination of the affairs of complainant, and an offer was made to defray the expenses of the committee, should it go and make the examination to ascertain whether the returns complainant had made were true. The committee promised the attorney that they would notify him if they were not satisfied with his statement,—that they would notify him if they intended to make any assessment of the capital stock of the company. The attorney, after this interview, returned home, but received no communication from the committee in regard to the assessment. Doubtless, the committee of the board before whom the attorney of the company appeared did wrong in making a promise which was not fulfilled or observed in relation to the assessment, but we

do not think this rendered the assessment fraudulent. What evidence was before the committee or the board upon which the assessment was made does not appear from anything in this record, and in the absence of any showing whatever in this regard, we must presume that the facts before the board, upon which it acted, were ample to justify the assessment. For aught that appears, the board may have made a thorough investigation as to the value of the capital stock of complainant, and become thoroughly satisfied, from uncontradicted evidence, before the assessment was made. It would be unsafe, and might result detrimentally to the best interests of the state, to establish a rule under which the action of the state board could be impeached by proving that one of its committees had failed to keep faith with some person acting for a corporation which had to be assessed by the board.

It is also claimed that the assessment of the board of equalization in 1884 violated the constitutional provision of uniformity. The same question arose in *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, and we there held that the provision of the constitution was not violated. The decision in that case must control here.

The judgment will be affirmed.

EQUITY CANNOT TAKE COGNIZANCE OF CASES involving simply a question of taxation, for such an issue is strictly one at law: *Minerva v. Hayes*, 2 Cal. 590; 56 Am. Dec. 366; *De Witt v. Hayes*, 2 Cal. 463; 56 Am. Dec. 352.

CARPENTER v. VAN OLINDER.

[127 ILLINOIS, 42.]

DEVISE OF LIFE ESTATE TO A, WITH REMAINDER IN FEE TO HIS HEIRS AT LAW, vests in him an estate in fee, and this result cannot be avoided by other parts of the devise, showing that the intent of the testator was to give A a life estate only.

RULE IN SHELLEY'S CASE.—THE TESTATOR'S MANIFEST INTENT CANNOT CONTROL the legal operation of the word "heirs," when standing for the ordinary line of succession as a word of limitation. If the term "heirs" is used in an instrument, comprehending the whole class of heirs, and they become entitled on the death of the ancestor to the estate in the same manner and to the same extent, and with the same descendible qualities as if the grant or devise had been simply to A. and his heirs, then the word "heirs" is a word of limitation, and the intention will not control the legal effect of the word.

A DEVISE OF THE USE OF THE LAND IS EQUIVALENT to the devise of the land itself, and carries the legal as well as the beneficial interest therein.

RULE IN SHELLEY'S CASE. — A DEVISE TO TESTATOR'S WIFE AND DAUGHTERS OF THE USE OF HIS PROPERTY, to be divided among them as the same would be by law without a will, except that none of his real estate was to be disposed of for their use, but to be kept sacred for their heirs, vests the devisees with estates in fee-simple absolute in his real property.

BILL in equity filed by Mary Van Olinder and Mary Keck against John T. Carpenter to obtain a construction of the will of Hiram Bauder. The will in question, so far as material to this case, was as follows: "I give and bequeath to my beloved wife, Mary Bauder, and to my three daughters, Harriet Elizabeth, Nancy Catherine, and Melissa, the use of all my property after the payment of all debts (except what is hereinafter disposed of in this will), to be divided among them as the same would be by law without a will, except that it is my will that none of the real estate be sold or disposed of except the wood-lot in the big woods, for their use, but to be kept sacred for their heirs." The decision of the circuit court was that the word "heirs" in the will was a word of limitation and not of purchase, and that the estate was vested in the devisees in fee-simple, and not for life. From this decision the defendant Carpenter appealed.

Charles Wheaton, for the appellant.

M. O. Southworth and N. G. Aldrich, for the appellee.

SCHOLFIELD, J. The question here is, whether, in construing a devise which assumes to give a life estate to the ancestor and the remainder in fee to the heirs at law of such ancestor, the language of the devise in giving the life estate, and other parts of the devise showing, in connection with that language, that his intention was to give only a life estate, must control.

It is quite clear, upon authority, that the answer must be in the negative. We held in *Baker v. Scott*, 62 Ill. 88, that the rule in Shelley's case is in force here as a rule of property, and that the question of intent, in determining whether it is applicable in a given case, does not turn upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs; and it was shown in that case that in the great case of *Perrin v. Blake*, 4 Burr. 2579 (3 Greenleaf's Cruise on Real Property, 313), as finally decided in the exchequer chamber, it was admitted that the rule in Shelley's case often defeats the undoubted intention of the devisor, "for," it was said, "there never was an instance where an estate for life was expressly

devised to the first taker that the devisor intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention, and vests the remainder in the ancestor."

Preston, in his work on estates (vol. 1, p. 281, *283), says, in speaking of the legal effect, under the rule in Shelley's case, of the words "heirs" in a devise or grant: "That all possible heirs of the given description are to take in succession, from generation to generation, under the name of heirs of the ancestor, is to bring the case immediately within the rule. That only one individual, or several individuals, is, or are, to take in the character of heirs, or rather as particular persons described by that name, either for their lives only, or for an estate of inheritance to be deducible from them as the stock or ancestor, and that their heirs are described by superadded words of limitation, and as their descendants, is to exclude the rule." And again, in the same volume, at page 362 (*363), this author says: "In wills, the rule [i. e., in Shelley's case], applies generally, and without exception, to the several limitations as often as the gift to the heirs is without any expression of qualification." And he thus illustrates his meaning: "Neither the express declaration,—1. That the ancestor shall have an estate for his life, and no longer; nor 2. That he shall have only an estate for life in the premises, and that after his decease it shall go to his heirs of his body, and in default of such heirs, vest in the person next in remainder, and that the ancestor shall have no power to defeat the intention of the testator; nor 3. That the ancestor shall be tenant for his life, and no longer, and that it shall not be in his power to sell, dispose, or make away with any part of the premises, . . . will change the word 'heirs' into a word of purchase."

Kent says (vol. 4, p. 233, 8th ed.), in speaking of the declaration of the exchequer chamber in *Perrin v. Blake*, *supra*: "The result of that famous controversy tended to confirm, by the weight of judicial authority at Westminister Hall, the irresistible pre-eminence of the rule [i. e., in Shelley's case], so that even the testator's manifest intent could not control the legal operation of the word 'heirs,' when standing for the ordinary line of succession as a word of limitation, and render it a word of purchase. If the term 'heirs,' as used in the instrument, comprehended the whole class of heirs, and they

became entitled, on the death of the ancestor, to the estate in the same manner and to the same extent, and with the same descendible qualities, as if the grant or devise had been simply to A and his heirs, then the word 'heirs' is a word of limitation, and the intention will not control the legal effect of the word. The term must be used as a mere designation of one or more individuals, or a new import given to it by super-added or ingrafted words of limitation, varying its sense and operation, in order to make it a word of purchase."

The principle applicable here is clearly and forcibly stated in Hay's Principles for Expounding Dispositions of Real Estate, 96 (7 Law Lib. 52), thus: "The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not. We might as well be asked whether a testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exceptions."

To like effect is *Bender v. Fleurie*, 2 Grant Cas. 345. The testator gave to his daughter certain land, in these words: "She shall have it as her own during her life, and then it is to come to the heirs of her body for their own use." And the supreme court of Pennsylvania said: "But it is said the testator did not mean to give her an estate-tail. Perhaps he did not. But he has used words which, in law, mean nothing else. If he intended to give but a life estate *voluit non dixit*, we must take what he said, not what he meant. . . . But no court in this state or in England has ever treated the phrase 'heirs of her body' as words of purchase when they are used with reference to the issue of a devisee to whom a life estate is given. They are words of limitation, and as such they create an estate-tail in the first taker, which cannot be cut down, even by the clearest desire that it shall be a life estate only." Under our statute cutting off entails, as construed in *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589, such a devise, we concede, would not here create an estate-tail. But that is purely because of our statute. The rule of construction thus laid down is beyond question pertinent and applicable here to devises like that before us which are unaffected by any statute of our state.

In *Hileman v. Bouslaugh*, 13 Pa. St. 344, 53 Am. Dec. 474, the same court, speaking of the rule in Shelley's case, said: "The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether

the rule shall be applied or not, whether the author of the limitation intended it to be applied or not." And again: "The question on a will is not whether the testator intended that the rule shall not operate,—for this is not subject to his power,—but whether he used the words, 'heirs of the body,' as synonymous with the word 'children,' or its proper equivalent."

The result of the authorities in regard to the question before us is well stated by Mr. Justice Elliott, speaking for the supreme court of Indiana, thus: "It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern and the rule in Shelley's case; but the appearance of conflict fades away when it is brought clearly to mind that when the word 'heirs' is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the rule in Shelley's case; so that the inquiry is, Was the word used as one of limitation? The only method in which an instrument employing the word 'heirs' can be shown not to be within the rule is by showing that the word was not employed in its strict legal sense": *Allen v. Croft*, 109 Ind. 476; 58 Am. Rep. 425; see also Theobald on Wills, 336 et seq. The doctrine thus sustained was assumed by us to be the law in *Wicker v. Ray*, 118 Ill. 472, and *Ryan v. Allen*, 120 Id. 648, though the present question was not there discussed.

Counsel for appellant cite general rules of construction, and some cases in apparent conflict with the foregoing views. A careful examination of the general rules cited will show that when their application to cases like the present is understood, there is no conflict; and the cases cited, with the exception of *Belslay v. Engel*, 107 Ill. 182, hereafter to be noticed, will be found, on examination, distinguishable from the present case, in that it appeared in those cases, from the connection in which they occurred, that the words "heirs" or "heirs of body" were used as synonymous with "child" or "children," or some other limited class, and not as meaning those who take by inheritance generally,—as heirs, in the technical sense of the word. Thus in *Millet v. Ford*, 109 Ind. 159, the devise is this: "I give and bequeath unto my son, James R. Rachels, during his lifetime, the following real estate: . . . to have the use of the above-described land during said James's life-

time, and after his death, to the heirs of his body in lawful wedlock, and none others." The words "heirs of his body in lawful wedlock" could by no possibility intend others than his children, and so the devise was precisely as if it had been to James R. Rachels and his children. And so in *Urich's Appeal*, 86 Pa. St. 386, the devise is to the devisor's children and their heirs. But in a subsequent clause he declares that none of his children should have the right to sell or encumber the lands, but the lands shall remain free for their children or heirs, etc., showing clearly that "children" and "heirs" were used as synonymous, — in other words, that when he said "heirs" he intended "children."

The other cases cited by counsel for appellant will be found to be alike distinguishable from the present case,—restricting and narrowing the meaning of the word "heirs" to particular persons, or to a particular class of persons less than that of heirs in general. The devise in *Belslay v. Engel*, 107 Ill. 182, was: "Sixth, I give and bequeath unto my granddaughter Catharine Belslay the free use and occupation of [then describing the lands in dispute] to have and to hold, to use, occupy, and enjoy the same, . . . during her natural life. . . . Thirteenth, it is my will, and this bequest is made upon the express declaration, that in case any of my said grandchildren should depart this life without issue of their body, then that all their share of said real estate . . . shall be equally divided among all my grandchildren and their legal representatives, and the title thereto thereafterwards so vest forever. It is my will that no title in fee to any of said land shall vest in my said grandchildren, and I declare it to be my will that they shall have only a life estate therein, and that the fee-simple shall vest in their legal heirs." It is plain that this is but equivalent to saying: "I give the life estate to my grandchildren, and the remainder in fee to their children." The heirs of those that die without issue of their bodies—i. e., children—being excluded by the necessary effect of the devise, it inevitably follows that none but children of grandchildren could be their "legal representatives," or their "legal heirs," and therefore, in using those terms, the testator clearly meant children of grandchildren,—and such was the effect of the decision.

Beyond all question, then, the case was rightly decided. In the argument of the opinion, however, there is language that seems to place the decision upon the intention of the testator

to vest a fee in the legal representatives or legal heirs of the grandchildren, as determined from a consideration of all of the language of the will, and not, as should have been done, upon the evident intention of the testator to use the words "legal representatives" or "legal heirs" as synonymous with "children," and therefore as words of purchase and not of limitation. This language of the opinion was unadvisedly assented to by a majority of the members of the court, and is now disapproved and overruled.

It is clear from the language, "to be divided among them as the same would be divided by law without a will," that the testator intended to give his wife and daughters the same use of the real estate that they would have been entitled to had he made no will, but that they shall not be allowed to sell it. A devise of the use of the land is equivalent to a devise of the land itself, and carries the legal as well as the beneficial interest therein: *Ryan v. Allen*, 102 Ill. 648. Had there been no will, our statute would have given the widow dower in the lands, and vested the fee in the daughters, — one third each, as tenants in common. Neither would have had an interest in the individual interest of the other, and therefore the heirs of one would not necessarily have been the heirs of the other. In the light of these observations, the will must be read, substantially, thus: "I give to my wife, Mary, dower in my lands, and I give to my daughters, Harriet E., Nancy C., and Melissa E., each, the undivided one third of my lands, subject to the dower of my wife, Mary, therein, except that it is my will that none of the real estate be sold or disposed of, . . . but that the same be kept sacred for their heirs." The injunction to not sell is plainly upon each, severally, because the title is not that of joint tenants, but that of tenants in common, and each, therefore, might sell without regard to the others. And for like reason the injunction to preserve is upon each, severally, and necessarily, to preserve that which is given her, and for her own heirs, because the heirs of no one else, merely as such, can have any interest in her estate.

The only limitation in the language employed in the will is that we have been considering. There is nowhere a single word or syllable to indicate that the word "heirs" was here used as the equivalent of "child" or "children" or "issue," or to otherwise indicate a class less comprehensive than that included within the technical meaning of "heirs at law." Under our statute, therefore, this general language of the

devise carries a fee: Rev. Stats. 1874, c. 30, sec. 13. The word "heirs," as here used, clearly means all who are to take, generally, without exception, as a class of inheritable persons, and as the successive heirs of the daughters named, severally, and not a part,—as individuals selected out of the class of heirs,—and therefore brings the case within the rule in Shelley's case: 1 Preston on Estates, 282, *283.

Stress is laid, in argument, upon different matters, as presented by the entire devise, claimed to show that the testator could not have intended to give an estate in fee to his daughters. But we have seen that that is not the question. If the language he used, in the legal sense that must be placed upon it in the connection in which it occurs, imports a conveyance in fee to the daughters, such must be its effect, although it may appear that he actually only intended to convey a life estate, the only inquiry permissible being, whether, from other parts of the devise, it appears that the word "heirs" was used in a sense more restricted than the term itself imports,—as the equivalent of "children," "issue," or some other partial or restricted class of heirs.

Finding no cause to disturb the judgment, it must be affirmed.

DEVISES AND BEQUESTS—LIFE ESTATES.—Gifts of personality to a wife for her use during life, remainder to her children, with power to sell, give the wife only a life estate: *Whittemore v. Russell*, 80 Ma. 297; 6 Am. St. Rep. 200. Where a testator bequeathed and devised property to his wife, "with the right to use, sell, or otherwise dispose of the same and the income and increase thereof, according to her own will and pleasure, during her lifetime, and so much thereof as might remain undisposed of by her at her decease" he gave to others, the wife only took a life estate: *Stuart v. Walker*, 72 Ma. 146; 39 Am. Rep. 311; to the same effect is *Green v. Hewitt*, 97 Ill. 113; 37 Am. Rep. 102; *Patrick v. Morehead*, 85 N. C. 62; 39 Am. Rep. 684; *Taylor v. Taylor*, 63 Pa. St. 481; 3 Am. Rep. 565; *Dunning v. Vandusen*, 47 Ind. 423; 17 Am. Rep. 709; *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186; *Cleveland v. Husens*, 13 N. J. Eq. 101; 78 Am. Dec. 90; *Healey v. Toppan*, 45 N. H. 243; 86 Am. Dec. 159. Where under a will there is given an express estate for life with a devise over, the estate given is not enlarged to a fee, either by charges upon it or by a power of sale: *Appeal of Hinkle*, 116 Pa. St. 490. Where a testator gave to his wife a house and lot and certain personality, to have "during her natural life to use as she may think best," and "at her death the realty and what personality remains undisposed of shall go to my grandchildren," the widow took no more than a life estate in the personality: *Loyce v. Bateman*, 43 N. J. Eq. 434. Where a testator devised his entire estate to his widow, providing that "after my death you can divide all I left between our children according to your best judgment," etc., the widow took only a life estate, with power to divide the property between her children by the testator: *Holten v. Rockhouse*, 83 Ky. 233. A life estate given by a

will is not ordinarily enlarged into a fee by a power of sale under such will: *Glover v. Stillson*, 56 Conn. 316; *Griffin v. Griffin*, 125 Ill. 430. A devise of a life estate to P. L. W., "to be held by her and her heirs to her sole and separate use," etc., and "at her death to go to her bodily heirs," etc., gives only a life estate to P. L. W., with a remainder in fee to her children, and a mortgage by her could confer no rights as against such heirs after her death: *Myar v. Snow*, 49 Ark. 125.

DEVISES AND REQUESTS — ESTATES IN FEE. — Where a bequest of personal property, without limitation to life or particular use, is made, and is accompanied with an absolute power of disposition, the first taker takes the whole interest: *Fullenwider v. Watson*, 113 Ind. 18. Where a testator devised land to his daughter, "to be kept and retained by her as long as she shall live, and to be disposed of as to her seems proper at her decease," with no devise over, she took a fee-simple: *Todd v. Sawyer*, 147 Mass. 570; to the same effect is *Wills v. Wills*, 85 Ky. 486; *Appeal of Drennan*, 118 Pa. St. 176; *Widener v. Beggs*, 118 Id. 374.

RULE IN SHELLEY'S CASE. — It may, we think, be conceded that what is known as the rule in Shelley's case is not one which resulted in ascertaining or executing the will of the grantor or testator. The rule has therefore been very generally supplanted by statutes in the various states of this Union: See note to *Polk v. Farris*, 30 Am. Dec. 415; *Wilkinson v. Clark*, 80 Ga. 387; 28 Cent. L. J. 191; *Howell v. Knight*, 100 N. C. 254; *Little's Appeal*, 117 Pa. St. 14. As the rule, however, remains in force in some parts of the country, we deem it worthy of further consideration. The rule itself has been variously stated. According to Lord Coke, the rule is as follows: "Where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same instrument an estate is limited, mediately or immediately, to his heirs in fee or in fee-tail, the heirs are words of limitation of an estate, and not of purchase."

In Hargrave's Law Tracts, 501, it is thus stated: "Where a person takes an estate of freehold, legal or equitable, under a deed, or will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of any interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestors to the whole estate."

A simpler and perhaps equally accurate statement of the rule is given by Mr. Preston, as follows: "In any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee-tail; if to his heirs, a fee-simple": *Butler v. Heustia*, 68 Ill. 594; 18 Am. Rep. 592.

As an estate in fee is one to a man and his heirs forever, any limitation in a deed or will which must necessarily have the effect of vesting an estate in one and his general heirs will be regarded as vesting an estate in fee. In other words, the word "heirs" is a word of limitation and not of purchase; and a deed to one and his heirs, though it may designate his estate as an estate for life, and their estate is an estate in fee, has no other effect than if his and their estate were not designated by any special words whatever. The word "heirs" is regarded as a word of art, and as having a controlling effect, and that effect is to vest a fee-simple in the first taker, and after his death, if the estate is undisposed of, to permit it to pass, in case of his intestacy, to those persons who, by the law of the land, are entitled to succeed to it: *Ware v.*

Edwards, 3 Mo. 505; 56 Am. Dec. 762; *Kay v. Connor*, 8 Humph. 624; 49 Am. Dec. 690.

"In a will, the legal force of the word 'heirs' may be controlled by the context evincing such a demonstrative intention to misapply it as cannot be mistaken; in an executed conveyance, never": *Hileman v. Bouslaugh*, 13 Pa. St. 344; 53 Am. Dec. 474.

The following grants and devises have been held to fall within the rule in *Shelley's* case, and therefore to vest an estate in fee in the first taker: A devise by a father to his daughter "to her benefit during her natural life; but my will is, that her husband have no control of her distributive share, but it be and remain the property of the heirs of her body after her death": *Wilberm v. Clark*, 80 Ga. 367; 12 Am. St. Rep.; a devise by the testator to his daughter in the following language: "And it is my desire that my daughter shall receive so much of her share of the rents and profits as shall be necessary for her education until she is twenty-three years of age, after which she may come into the possession of the full amounts of rents and profits, the principal to descend to her heirs": *Baker v. Scott*, 62 Ill. 86; a conveyance to the grantor's granddaughter "during the period of her natural life, and to her heirs forever thereafter": *Brislain v. Wilson*, 63 Id. 173; a devise to testator's five children, "or their children's heirs or executors, to be equally divided among them": *Hochtedler v. Hochtedler*, 108 Ind. 506; a devise as follows: "And it is my will that my son John shall have that land as follows, . . . to be for his use his life, and then to fall to his heirs": *McCray v. Lipp*, 35 Ind. 116; a conveyance "to O her lifetime, and after her death, to descend to the heirs of her body": *Andrews v. Spurline*, 35 Id. 292; a devise "to three daughters, to have and to hold to them during their natural lives, and after their deaths, then to the lawful issue of said three daughters, and the heirs and assigns of such issue": *Carroll v. Burns*, 108 Pa. St. 386; a direction by the testator that his house shall be finished as soon as possible, and that his wife should have and enjoy the rents and profits thereof during her natural life, and after her death the same shall go to her heirs absolutely, but if during the continuance of her life the building should be destroyed by fire, she should have full power to sell the lot, and appropriate the proceeds to her own use: *Vootackel v. Patterson*, 114 Id. 21; a bequest of all the balance of testator's estate, real, personal, or mixed, to his three nieces, "ahare and share alike, during their lives, and at their deaths to go to their heirs, in equal amounts to all heirs living at the time of their deaths": *Cockin's Appeal*, 111 Id. 26; a bequest of a negro girl to testator's daughter, "to be enjoyed by her during her lifetime, and then to descend to her lawful heirs": *Maulding v. Scott*, 13 Ark. 88; 56 Am. Dec. 298; a devise of rents and profits to M. until his youngest child shall become of age, "upon the happening of which event the fee-simple of said lands shall then vest absolutely in said M. and his heirs, and may by him or them be disposed of as he may judge best for his or their interest": *Shimer v. Mann*, 99 Ind. 190; 50 Am. Rep. 32; a devise to the testator's daughter "for her natural life, and after her death, I give the same to her heirs forever": *King v. Utley*, 85 N. C. 59.

The fact that the persons in whom the estate is to vest after the death of the first taker happen to be his heirs is not conclusive that the case falls within the rule in *Shelley's* case; for that rule applies only when the persons who are to take after the termination of the life estate necessarily include all the heirs of the first taker, whomsoever they may be. The estate may be limited to the children of the first taker, and if so, they will take the remainder, although it also happens that they are his only heirs. While the word

"heirs" is a persuasive word, and perhaps a controlling one when in a deed, a devise may doubtless contain explanatory words from which it appears that the testator did not use the word "heirs" in its technical or artificial sense, but merely as describing a particular class of persons. Where this is the case, the rule in Shelley's case does not apply, and the persons designated as "heirs" may take the remainder, leaving to the first taker no more than a life estate. Thus in *Bunell v. Evans*, 26 Ohio St. 409, it appeared that the testator devised real estate to his son "John through his natural life, and then to his heirs." In the latter part of the will the testator declared that if any of the "above-mentioned heirs shall bring in an account against the estate for labor or service, his share of the estate shall become forfeited, and be distributed among the testator's remaining children." The opinion of the court here was that the will, "taken as a whole, showed that the word 'heirs' was used by the testator in the sense of children, and that as the devise in remainder failed for want of children to take it, the estate reverted to the brothers and sisters of John and their representatives, not as his heirs or next of kin, but as the heirs of testator." In *Bensley v. Engel*, 107 Ill. 182, the testator, by the sixth clause of his will, bequeathed to his granddaughter Catherine the free use and occupation of certain lands, "to have and to hold, use, occupy, and enjoy, the same, together with all the rents, issues, and profits therefrom, with the appurtenances, during her natural life." In the thirteenth clause he declared: "It is my will, and this my bequest is made upon the expressed declaration that in case any of my grandchildren should depart this life without issue of their body, then that all their share of said real estate (or to whom the use therefor is bequeathed as aforesaid) shall be equally divided among all my grandchildren and their legal representatives, and the title thereto thereafterwards shall vest forever. It is my will that no title in fee to any such lands shall vest in my said grandchildren; and I declare it to be my will that they shall only have a life estate therein, and that the fee-simple shall vest in their legal heirs; and it is my will that they, nor any of them, shall have any right to sell, dispose, mortgage, or encumber in any manner any said lands, and that they shall keep it free and clear for their legal heirs to whom it shall descend forever." Interpreting these two clauses, the supreme court of the state said: "Construing the sixth and thirteenth clauses of the will together, it does not seem the language employed brings the devise made by the sixth clause within the rule in Shelley's case, as it has been defined by this court in *Baker v. Scott*, 62 Ill. 86, or in *Butler v. Huestis*, 68 Id. 564, 18 Am. Rep. 589. It is, at most, a technical rule of construction, and has always since the decision in *Perrin v. Blake*, 4 Burr. 2579, given way to the clear intention of the testator or donor, when that intention could be ascertained from the instrument in which the words supposed to be words of limitation were used. This rule will control, unless where it contravenes some settled principle of law; otherwise, instead of being a rule by which justice could be administered, it would be a source of incalculable mischief in its practical application. No reasoning can disabuse the mind of the impression made upon it by the plain and natural reading of the sixth and thirteenth clauses of this will, that the testator only intended to give his grandchildren a life estate in the property bestowed upon them for their use during their natural lives, and no subtle *finesse* of construction will be adopted to defeat that intention." So, in *Brunfield v. Drock*, 101 Ind. 190, where a testator bequeathed certain property to his daughters and their heirs, "subject to their control only, it being my intention that my said daughters and their children shall

have the sole benefit of their shares of my estate, both real and personal"; and it was declared that he had manifestly used the word "heirs" as a mere designation of the children of his daughters, and that therefore such children took an estate in remainder under the law. Jacob Stoudt devised a farm to his son John "and to his heirs," and other property to his other children. By the fourth clause in his will he declared: "I hereby make known and declare that it is my will that none of my aforesaid children shall have a right to sell or assign their land or property to them bequeathed as aforesaid; neither shall they have a right to encumber it with debts or liens, but the land shall remain free for their children or heirs, and they, my said children, shall have the use, income, and profits of said lands and farms during their lifetime." In considering this will, the court was of the opinion that it was against the manifest intention of the testator to treat the word "heirs" in the principal devise as conclusively descriptive of the quality of the estate; that this was not a case of a mere attempt to clog the fee with illegal conditions; that upon the whole will, it was clear that the testator intended the property to remain free for his children or heirs, and that they should not alien or encumber; that the prohibition against alienation and encumbrance was only in support of the further condition expressed in the will that the testator's children should have the use and profits of the lands for their lifetime only, and, finally, that the full meaning of the testator was, that "his own children should have the use, income, and profits of the lands devised for life only, without power to alienate or encumber, in order that the lands should remain after their death for their children": *Urich's Appeal*, 86 Pa. St. 386; 27 Am. Rep. 707. "A deviser who uses words of limitation in an improper sense may so explain the meaning of them by other words in the context as to exclude his devise from the rule; for it operates only on the intention, when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills; but when the intention thus ascertained is found to be within the rule, there is but one way; it admits not of exceptions. It is to the application of those ordinary rules, sometimes controlling the meaning on weak and inconclusive grounds, and not the nature of the particular rule, — which is in truth not a rule of construction, — that the discrepancy of the decisions is attributable. The question on a will is not whether the testator intended that the rule should not operate, for that is not subject to his power; but whether he used the words 'heirs of the body' as synonymous with the word 'children,' or its proper equivalent": *Hilman v. Boulaugh*, 18 Pa. St. 344; 53 Am. Dec. 474. Before the word "heirs" can be given any other than its legal signification, and can be permitted to vest an estate in any one by purchase, it must appear "by plain and manifest indications that the testator intended to deviate from the general rule; for that is never supposed until made out, not by conjecture, but by strong and conclusive evidence." It is not sufficient, to convert the word "heirs" into a word of purchase, that the testator, after devising certain property to his son J. and his present wife during his natural life, directs that after the decease of his said son and wife that the said land "descend to their heirs jointly, and their heirs and assigns forever, or to such of them as may be then living": *Cresswell's Appeal*, 41 Pa. St. 288. If the words of the deed or will are such as to show that the estate is vested in the first taker and his heirs, the operation of the rule in *Shelley's case* cannot be avoided by other words seeking to impose limitations upon the estate in fee, which the law will not permit, such as a prohibition against its sale or disposal:

Robert v. Ogbourne, 37 Ala. 174. "There is another principle of the law of real property, which exerts a controlling influence here, and that is this: Where an estate in fee is created in clear and decisive terms, a restriction upon the right of alienation is of no effect": *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Ingersoll's Appeal*, 86 Pa. St. 240.

Other words may be used in a grant or devise, which may or may not be regarded as equivalent to the word "heirs," according to the intention of the grantor or deviser, as apparent from the whole will. Thus the word "issue" is either a word of purchase or of limitation, as will best effectuate the deviser's intention: *Doe v. Collis*, 4 Term Rep. 294; *Cushney v. Heary*, 4 Paige, 351; *Shreve v. Shreve*, 43 Md. 382. "In a will, 'issue' is either a word of purchase or of limitation, as will best answer the intention of the deviser, though in the case of a deed, it is universally a word of purchase": *Doe v. Collis*, 4 Term Rep. 294. "There is a less degree of presumption against construing the word 'issue' as a word of purchase than against construing the words 'heirs of the body' as a word of purchase, and a still less degree of presumption against that construction of the word 'issue' than against the same construction of the word 'heirs,' generally; so that, *prima facie*, the word 'issue' is more likely to be a word of purchase than the words 'heirs of the body,' and still more likely than the word 'heirs,' generally": Smith on Executory Interests, 528; *Powell v. Board of Missions*, 49 Pa. St. 46. "It is well settled that the word 'issue' in a will *prima facie* means 'heirs of the body,' and in absence of explanatory words showing that it was used in a restrictive sense, it is to be construed as a word of limitation. But if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be only applied to children, or to descendants of a particular class, or at a particular time, it is to be construed as a word of purchase, and not of limitation, in order to effectuate the intention of the testator": *Robins v. Quinliven*, 79 Pa. St. 333; *Powell v. Board*, 49 Id. 46; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; note to *Quackenbos v. Kingsland*, 55 Am. Rep. 778.

Whether the words "heirs of the body" are equivalent in signification to the word "heirs" alone, is a question upon which the authorities conflict. Many of them seem to construe the words "heirs of the body" as being synonymous with the word "heirs," and therefore as falling within the rule in Shelley's case: *Floyd v. Thompson*, 4 Dev. & B. 478; *Dott v. Cunningham*, 1 Bay, 453; 1 Am. Dec. 624; *Maulding v. Scott*, 13 Ark. 88; 56 Am. Dec. 298; *Wilkerson v. Blach*, 80 Ga. 367; 28 Cent. L. J. 191. We think the better opinion, however, at the present time is, that the words "heirs of the body" must ordinarily be construed as words of purchase, and therefore as sufficient to vest in the persons thus designated an estate in remainder: *Butler v. Huestis*, 68 Ill. 594; 18 Am. Rep. 589; *Den v. McPeak*, 2 N. J. L. 291; *Clark v. Smith*, 49 Md. 106; Washburn on Real Estate, 73; *Swain v. Roscoe*, 3 Ind. 200; *Myers v. Anderson*, 1 Strob. Eq. 344; 47 Am. Dec. 537. Thus Mr. Washburn, at page 72 of his work on real estate, says: "In order to create an estate-tail, there must be a limitation in express terms or by direct reference, not only to heirs, but to heirs of the donee's body. If it be to a man and his heir, it will not ordinarily pass an estate of inheritance, though in a will it may on the ground of carrying out the deviser's intention." Giving instances of the creation of estates-tail without the use of the words "of the body," he further says, at page 77: "Among the illustrations given of estates-tail having been created by or without the use of the words 'of the body,' or of words regarded as equivalent, are, — to A and

his heirs, viz., the heirs of his body, or of himself lawfully issuing or begotten, or of his flesh or of his wife begotten, or which he shall happen to have or beget."

The use of words of procreation in designating the persons who are to take after the termination of the life estate seems to be conclusive in taking the grant or devise out of the operation of the rule in Shelley's case: *Adams v. Bos*, 30 N. J. L. 505; 82 Am. Dec. 237. Hence, if the grant or devise be to one and the male heirs of his body lawfully begotten, or to him and his heirs lawfully begotten, or to one and the begotten heirs or heiresses of his body, in all these cases, the estate of the first taker is for life only, and after his death the persons designated as begotten heirs take an estate in fee: *Leathers v. Gray*, 96 N. C. 548; *Good v. Good*, 7 El. & B. 295; *Pierson v. Vickers*, 5 East, 548; *Nanfan v. Leigh*, 2 Marsh. 107; 7 Taunt. 85; *Mamaring v. Tabor*, 1 Root, 79; *Allen v. Bunce*, 1 Id. 96. If the persons who are to take after the termination of the life estate are designated as the "children" or as "some of the children" of the first taker, or if, though named in one part of the will as his heirs, it is manifest from the will, considered as a whole, that the word "child," or "children," was intended, then such child or children take an estate as purchasers: *Canedy v. Haskins*, 13 Met. 389; 46 Am. Dec. 739; *Millet v. Ford*, 109 Ind. 159; *Beacroft v. Strawn*, 67 Ill. 28; *Jones v. Cable*, 114 Pa. St. 582. The word "children" is always regarded as a word of purchase: *Chambers v. Payne*, 6 Jones Eq. 276; *Reeder v. Spearman*, 6 Rich. Eq. 138; *Gernet v. Lyn*, 31 Pa. St. 94; *Stump v. Jordan*, 54 Md. 619; *Fute v. Townsend*, 61 Miss. 316. These remarks are as equally applicable to the word "lineal descendants," when used for a like purpose: *Henderson v. Henderson*, 64 Md. 185; *Mason v. Ammon*, 177 Pa. St. 127.

A devise or conveyance to one and his children, or to one and his present heirs, without any designation of the estate which each is to hold, does not fall within the rule in Shelley's case, neither does it vest an estate-tail. In such case both the ancestor and his children or heirs take a present estate in fee, either as joint tenants or tenants in common: *Biggs v. McCarty*, 86 Ind. 362; 44 Am. Rep. 220; *Goodright v. White*, 2 W. Bla. 1010; *Fountain v. Beckheimer*, 102 Ind. 76; 52 Am. Rep. 645.

A devise or settlement in favor of one for life with remainder to his heirs by his present wife does not fall within the rule in Shelley's case, although it is not expressly stated that her heirs are to be such only as are by him begotten: *Dex v. Hobson*, 2 W. Bla. 693; *Vernon v. Wright*, 7 H. L. Cas. 35. The rule remains the same although the limitation is to one, his heirs and assigns forever, by his present wife. The word "assigns," as here used, is not regarded as having any legal effect whatsoever: *Somers v. Parsons*, 1 Harr. 181; *Wearst v. Cruser*, 49 N. J. L. 475.

If a devise is to one for life, and that the remainder after his death is to be equally divided among his legal heirs, or the heirs of his body, such heirs take an estate by purchase, and the estate of the first taker has a life estate only: *Greene v. Camery*, 69 Iowa, 220; *Jenkins v. Jenkins*, 96 N. C. 254; *Mills v. Thorne*, 95 Id. 382; *Ward v. Jones*, 5 Ired. Eq. 400; *Greene v. Camery*, 69 Iowa, 220.

If, after making a devise to A for life, and after his death to his heirs or his issue, the will provides for some disposition which must be made of the property in the event of the death of A without heirs or issue, as the case may be, the rule in Shelley's case is inapplicable; and the estate which vests in A is not an estate in fee-simple, but an estate-tail: *Doe v. Applin*, 4 Term Rep. 82; *Dex v. Purkey*, 4 Id. 299; *Doe v. Halley*, 8 Id. 5; *Doe v. Child*. 1

Scott N. R. 290; 1 Man. & G. 429; *Dansey v. Griffiths*, 4 Maule & S. 61; *Blair v. Vanblanckum*, 71 Ill. 290; *Bassett v. Hawk*, 118 Pa. St. 94; *Howell v. Knight*, 100 N. C. 254; *Moody v. Snell*, 81 Pa. St. 359; *Cyfee v. Milk*, 10 Met. 386; 13 Id. 389; *Brownell v. Brownell*, 10 R. I. 509; *Patrick v. Morehead*, 85 N. C. 62; 39 Am. Rep. 684; *Arnold v. Brown*, 7 R. I. 196; *Tidball v. Lupton*, 1 Rand. 194; *Sleigh v. Strider*, 5 Call, 439; *Sharp v. Thompson*, 1 Whart. 139; *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399; *Duer v. Boyd*, 1 Serg. & R. 203; *James's Claim*, 1 Dall. 47; *Keys v. Goldsborough*, 2 Har. & J. 369; *Mockbre v. Clagett*, 2 Har. & McH. 1; *Shanks v. Blackiston*, 4 Id. 481; *Allgood v. Blake*, L. R. 8 Ex. 160; *Doe v. Dluck*, 2 Marsh.; 6 Taunt. 485; *Doe v. Flydes*, Cowp. 833; *Morgan v. Griffiths*, Id. 234.

"Where the terms of a bequest of a personalty are such as would, in a devise of real estate, create an estate-tail in the devise, it operates as an absolute gift of the personalty, and a bequest over on the failure of the issue of the first taker is void: *Lyon v. Mitchell*, 1 Madd. 467, 1st Am. ed. 253; 2 Roper on Legacies, 1520, c. 22, sec. 1. When the gift is to A and his issue, or to A and the heirs of his body, and the limitation over is upon an indefinite failure, the estate vests absolutely in the first taker. But when the limitation over is upon a definite, not an indefinite, failure of issue, the first legatee takes an estate for life only, and the limitation over is good": *Cleveland v. Havens*, 13 N. J. Eq. 101; 78 Am. Dec. 90.

A devise to G. H. C., "to him and the heirs of his body lawfully begotten, with full power and authority to him to sell and convey the same in his lifetime, or dispose of the same by last will and testament; but should the said G. H. C. die without issue of his body lawfully begotten, and without having disposed of the same by sale, or by last will and testament, either in whole or in part, then I give and devise my said estate, both real and personal, as above disposed of, to my cousins J. N. C. and T. B. P. in equal portions, share and share alike, to them and their heirs,"—vests an estate in fee in G. H. C.; for "whenever it is the clear intention of the testator that the devisees shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with an absolute property supposed in the first devise, and the right of the first devisee to dispose of the estate devised at his own pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift": *Idc v. Idc*, 5 Mass. 500; *Jackson v. Robins*, 16 Johns. 537; *Combe v. Combe*, 67 Md. 11; 1 Am. St. Rep. 359; *Benkert v. Jacoby*, 36 Iowa, 273; *Smith v. Starr*, 3 Whart. 62; 31 Am. Dec. 498.

It is essential to the operation in the rule in *Shelley's* case that the persons designated as heirs of the first taker must be those who, if there were no such limitation, would be entitled as heirs to the whole estate upon his death: "For instance, if the first estate be limited to A and B and the limitation over be to the heirs of B, it turns the estate of A and B at once into a joint life estate, and the heirs of B would take as purchasers or remaindermen, for they could not take by descent, being the heirs only of one": 1 Washburn on Real Estate, 78.

It is also necessary to the application of the rule in *Shelley's* case that the estate of the tenant for life, and that of all persons designated as remaindermen, be of the same kind or quality: *Ward v. Armory*, 1 Curt. 419; *Wyndle's Trust*, 28 Eng. L. & Eq. 375; *Thurston v. Thurston*, 6 R. I. 296. Hence a devise to A, in trust for his heirs as long as he shall live, and after his death to his heirs, their heirs and assigns, vests in A a life estate only, and the fee in his heirs: *Plummer v. Hilton*, 78 Me. 226; and generally where the use

only is given to the first taker, and his heirs, designated as remaindermen, take both the legal and the beneficial estate, the rule in Shelley's case is inapplicable: *Jenkins v. Jenkins*, 96 N. C. 254; *Mills v. Thorne*, 95 Id. 362; *Williams v. Houston*, 4 Jones Eq. 277; *Kiser v. Kiser*, 2 Id. 28. But if the estate of the tenant for life and that of his heirs is of the same quality, it is no objection to the application of the rule in Shelley's case that the estate of both is equitable merely, as where a devise is to A to the use of B during life, and after the death of the latter to the use of his heirs at law: *Armstrong v. Zane*, 12 Ohio, 337.

STOCK EXCHANGE v. BOARD OF TRADE.

[127 ILLINOIS, 163.]

MARKET QUOTATIONS AND REPORTS OF THE BOARD OF TRADE BECOME AFFECTED WITH A PUBLIC INTEREST, if they, for many years, have been gathered and disseminated by telegraph companies and sent to all who would pay therefor, and if a great system for the instantaneous and continuous indication of the market has thus been established, and all dealers have conformed to the system and adopted its methods.

THE BOARD OF TRADE OF CHICAGO HAS NO RIGHT TO CREATE A MONOPOLY IN ITS MARKET QUOTATIONS AND REPORTS. As long as it continues, directly or indirectly, the business of collecting and furnishing to the public such reports and quotations, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms; and it has no right to withdraw from one person instruments or facilities which it grants to others.

BILL filed by the New York and Chicago Grain and Stock Exchange for an injunction to prevent the Board of Trade of Chicago from depriving complainant of the use of wires and instruments, and withholding from it the market reports. The bill was dismissed for want of equity, and the complainant thereupon appealed.

Bisbee, Aherns, and Decker, for the appellants.

Sidney Smith, for the appellee.

BAKER, J. The objects of the Board of Trade of the city of Chicago are, "to maintain a commercial exchange, and to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economical information; and, generally, to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." The association existed for some years prior to the eighteenth day of February, 1859, as a mere voluntary and

unincorporated society of persons engaged in the grain, produce, and commission business, and at that date it was incorporated by a special act of the general assembly of the state of Illinois, and was given power and authority to do and carry on business such as is usual in the management of boards of trade or chambers of commerce, and the specific powers enumerated in the act of incorporation. Among the express powers delegated was authority "to establish such rules, regulations, and by-laws for the management of their business, and the mode in which it shall be transacted, as they may think proper."

The growth and progress of the association in commercial influence has been commensurate with that of the city in which it is located. The initiation fee for admission to it is ten thousand dollars, and it has some two thousand members. It maintains an exchange hall, upon the floors of which, between certain prescribed hours of each business day, the business of its members is transacted. It has been said, and with much show of reason, that the floors of this exchange hall stand in the gate-way of commerce. The members of the board meet thereon to buy and sell; their trading is by open *viva voce* bidding; and when a purchase and sale is made, memoranda thereof are taken by both parties to the transaction. Four fifths of the grain and provisions produced in the states and territories of the Northwest are bought and sold in this market, and the business there done is so vast in its proportions that it fixes the market prices of grain, breadstuffs, and meats for the extensive territory that is tributary to Chicago, and seriously affects, and to a considerable extent controls, the values of the necessities of life throughout the United States and the civilized world.

For many years prior to August, 1883, the Board of Trade permitted the Western Union Telegraph Company, by its agents and servants in that behalf, to occupy and use its exchange hall, and there collect and transmit, without any restriction whatever, reports of the dealings, fluctuations, and changes of the market on the board. This information was sent by telegraph throughout the country, and delivered, without discrimination, to all persons who desired and would pay for the same. There were numerous customers of this commercial news department of the business of the telegraph company, and they were scattered over the land, wherever the business of buying and selling grain and provisions was followed. The

Western Union Telegraph Company then had, and still has, a lease upon and control of the Gold and Stock Telegraph Company, which latter corporation, in turn, had and has a monopoly of the telegraphic instruments known as "tickers." Telegraphic circuits were established by the Western Union Telegraph Company in Chicago, and in other principal cities, and by means of Morse instruments and these tickers market information passed to every office and place of business connected by wire with one of these circuits, and was automatically registered, so that every merchant or dealer provided with these instrumentalities, wherever his place of business might be, was instantaneously, and from minute to minute, and from hour to hour, during the business sessions of the Board of Trade, informed of all fluctuations and changes in the market prices of grain and other products as they occurred.

On the 29th of August, 1883, the Board of Trade amended its standing rules by adopting what is known as section 20 of rule 4, which is as follows: "The board of directors shall provide an efficient corps of market reporters, whose duty it shall be, under such regulations as may be prescribed for their government, to ascertain the current market prices of such commodities as are dealt in by members of the association, during the hours for trading prescribed by these rules, the reporting of which may be desired by any considerable number of correspondents, and also all changes which may occur in the same from time to time; such reports to be frequently communicated by telegraph to such approved correspondents in the city of Chicago, or elsewhere, as may desire the same, and are willing to pay necessary charges for compiling and transmitting them by telegraph, under such arrangements as may be made by the board of directors with any telegraph company for the performance of the service of transmission. The forwarding of such reports to any particular individual, firm, or corporation shall be only on the condition that it is an accommodation service, in which the Board of Trade assumes no responsibility beyond reasonable care in their compilation, and one that may be performed at the pleasure of the board, or, if performed, may be discontinued or withheld, with or without previous notice. Any individual, firm, or corporation, before being supplied with the reports herein provided for, shall make an application for the same, in such form or manner as may be authorized by the

board of directors, or by a committee appointed by it for that purpose, before any reports are forwarded to the applicants. A list of all correspondents to whom such reports are sent shall be kept on file in the office of the secretary of the board, and shall be subject to the inspection of any member desiring to do so."

Since the adoption of this rule, the board, under a contract or arrangement with the Western Union Telegraph Company, has employed a corps of market reporters, who collect and transmit from the floor of the exchange, over a wire owned by it, the occurrences on the floor of the exchange, showing the fluctuations and changes of the market right along, just as they transpire during the day, to the central office of the said telegraph company. From this office, such information is immediately retransmitted over the ticker circuits in the city, and over telegraph wires to different points.

The expense to the board of its corps of market reporters is \$10,000 a year, and the telegraph company pays to the board \$750 a month, making \$9,000 per annum for the market quotations, and the telegraph company collects compensation from the persons receiving the dispatches or connected with the ticker circuits. The board furnishes to the telegraph company, from day to day, a list of the names of the approved correspondents, some thirteen hundred or fourteen hundred in number, to whom, and to whom only, the market reports are to be transmitted, and they are sent to these designated parties only. The theory of the Board of Trade and of the telegraph companies is, that this commercial information, starting with the opening of business in the morning, and giving the transactions on the floors of the exchange, and the fluctuations and changes in the market, from minute to minute and hour to hour, until the close of the business day, is a private telegraphic message sent by the board to each of the persons designated in the list furnished in the morning; and on this theory, the name of an officer of the board is added to the information collected, and sent to the telegraph company, as evidence that the matter which has been sent in sections during the day is a telegraphic dispatch, sent by authority of the Board of Trade as its own private message.

The appellant corporation, the New York and Chicago Grain and Stock Exchange, is organized under the laws of the state of Illinois, for the purpose of doing business in buying and selling grain on commission; and on the 29th of April, 1885,

its place of business was at No. 140 Monroe Street, Chicago, and it had in use at said place, in its business of buying and selling grain on commission, one Morse instrument and two tickers, which were connected with the wires of the Western Union Telegraph Company, and by means of which the market information in relation to the changes and fluctuations of the market on the Board of Trade of Chicago was transmitted and delivered to it instantaneously and continuously during business hours, and which information it was using in and about its business. At and before the time of the filing of the bill of complaint herein, the appellant, then being in receipt of the market information in respect to the transactions on the Board of Trade, demanded the continuance of such information, and offered to pay for the same, and submit to all reasonable requirements in relation thereto. Appellees, however, insisted upon their right to remove the telegraphic instruments, and sever the wire connecting its place of business with the ticker circuit. They threatened and were about to deprive appellant of the use of the wire and instruments, and withhold from it the market reports, and thereupon appellant exhibited this bill of complaint; and upon the ground the contemplated conduct and proceedings of appellees, the Board of Trade and said telegraph companies, would be disastrous to its business, and would produce irremediable injury and damage, obtained a preliminary injunction in the circuit court of Cook County. At a subsequent term of the court, the cause was heard on bill, answers, replications, and proofs, and the court found that appellant was not entitled to the relief prayed for in its bill, and said bill was dismissed for want of equity, and a decree rendered against appellant for costs. This finding and decree was afterward affirmed in the appellate court for the first district, and the cause is now here on appeal from the judgment of the latter court.

The contention of the Board of Trade is, that it is strictly a private corporation, and that both the individual and aggregate business of its members is essentially private business, and that the market news and statistics collected and compiled at the expense of the association are the private property of the association, and that it has a legal right to control such market news and statistics, and determine what telegraphic dispatches touching the same it will send directly from the floor of its exchange during business hours, and to whom they shall be sent, or whether it will send any such dispatches

whatever. The Board of Trade is a private corporation, and it was incorporated for the purpose of affording facilities to its members in doing business with each other. In their transactions upon the floors of the exchange they deal as principals with each other, but in respect to the outside world they are brokers and commission merchants for the producers, consumers, shippers, and merchants whom they represent. For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessities of life throughout the country and the world. The great power and influence which the board possesses in dictating market values are owing to the vast aggregation of products which are drawn to its portals for a market, and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business,—though in form, and as between the members, the mere private and individual dealings of such members,—is in reality the business of the numerous producers, consumers, merchants, and shippers for and on behalf of whom these members deal. A potential factor in attracting this accumulation of business to the halls of the exchange, and in vesting the board with this power to regulate and determine the market prices of grain and provisions, is the fact that many years ago the board admitted and invited the telegraph companies, which are *quasi* public corporations, to the floors of the exchange, and permitted and encouraged them to gather market quotations, showing the changes and fluctuations in the prices of the various products as they occurred, and send instantaneous information from the floors of the board, by means of telegraph lines and instruments, to all the principal towns and cities, and by means of ticker circuits to the places of business of all persons desirous of such information, which information was furnished to all persons and corporations, without discrimination, who were willing to receive and pay for the same. In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and determined on the Board of Trade, and the business of dealing in such products has been brought to conform to the method of receiving instan-

aneous and continuous market reports, inaugurated, and for years persisted in, by the Board of Trade and the telegraph companies. This market news is a species of property, and if the statistics with reference to the individual business of the members of the association, and the aggregate business of its members, had from the start been gathered and compiled at the expense of its members, and for their sole use, it may be it would have been strictly private property held in trust by the board for the use and benefit of such members, and wholly free from any public interest therein. But the board did not so exercise its franchises and so conduct its business, but admitted the telegraph companies to the floor of its exchange, and permitted and encouraged them, from day to day and year after year, to gather these statistics of the dealings on the board, and telegraph them, immediately as they were made, throughout the land, to whosoever would pay for such information, until the business of the country had adapted itself to these means and appliances, and the point was reached when the quotations upon the board were puissant to determine the market values of the products of the country, and all persons dealing in such products could not, without the knowledge and benefit of these immediate quotations, intelligently and safely so deal.

The facts that the Board of Trade is a private corporation, and that the dealings between its members are private business, such as is transacted between dry goods, grocery, and commission merchants, and that the statistics of these dealings, collected as we have stated, are private property, are not conclusive that such statistics are not charged with a public interest, and that there is no duty due the public in respect thereto. In the case of *Munn v. People*, 94 U. S. 113, the supreme court of the United States recognized and followed the doctrine that when private property is devoted to a public use and becomes affected with a public interest, it ceases to be *juris privati* only, and is subject to public regulation. The court there said: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

Assuming these market quotations and reports are property,

and the private property of the Board of Trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily, to all alike, common to all, and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the Board of Trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them.

The market information here involved is not collected by the board merely for the use of the members of the association. For many years it was gathered and disseminated by the telegraph companies, and sent to all alike who would pay for it, wholly regardless of any question of membership in the board. The change that has been made by section 20 of rule 4, in respect to this commercial news department, seems to be more colorable than substantial, and appears to be intended merely to enable the board to make a monopoly of such news. At first the telegraph companies, by their paid agents, gathered the statistics and telegraphed them from the floors of the exchange. Now the board appoints and pays the agents who collect the statistics and transmit them to the central telegraph office of the Western Union Telegraph Company, from whence they are distributed to the approved correspondents. But nine tenths of the expense of this service of collecting the market reports is refunded to the board by the telegraph company.

The question here is not one of withholding altogether instantaneous quotations and information respecting the prices at which grain and provisions are being sold upon the market of the exchange, nor one of discriminating between its own members and such persons as are not members, in giving such information. Before the board itself assumed to control the sending of this news, no discrimination was made in dis-

tributing it between those who were and those who were not members of the board; and since the change was made a very large proportion of the approved correspondents are not members, and the rule contemplates that persons other than members should be such correspondents. The question is, Can the board so conduct its affairs for a long term of years as to create a standard market for agricultural products, and, acting in concert or combination with the telegraph companies, build up a great system for the instantaneous and continuous indication of that market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, and until, by the usage and custom of merchants thus advanced by the methods adopted by the board and telegraph companies, such instantaneous market quotations become necessary to the successful and safe transaction of business, and until such system has become impressed and affected with a public interest, and then be allowed to discriminate between persons and parties, and, where all alike are willing to conform to reasonable rules and requirements and pay for the information desired, say that one shall and another shall not have such information? If the board has such right, and these corporations are lawfully permitted so to do, then they have the power to create monopolies and dictate who shall deal in the agricultural products of the country, and at will impoverish or enrich merchants, shippers, and producers.

It is vain to say that the ordinary newspaper reports of the state of the market are all that are necessary to legitimate dealers in grain and provisions. The business of the country has outgrown such condition, and this very largely through the methods adopted and introduced by appellees themselves. The fact that fourteen hundred persons, firms, and corporations are in receipt of these instantaneous market reports, and are willing to pay therefor the large fees and charges demanded of them for the receipt of the same, is proof positive that a business advantage is gained by immediate knowledge of the condition of the market. The persistent efforts of the Board of Trade itself to control these market reports are an indication of their estimate of their value.

We do not wish to be understood as holding that the Board of Trade is bound by law to continue the business of collecting and furnishing to the public market quotations, or that it may not voluntarily abandon such business; but we hold

that so long as it continues to carry it on, either directly or indirectly, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms.

There is no question involved in this case of gambling contracts, or of so-called "bucket-shops." There is no evidence in the record tending to show that appellant is engaged in a gambling business or dealing in "puts" and "calls," and it is admitted that the business it is doing is not in violation of law.

We think the case made by the bill of complaint and the proofs brings it within the rule announced by the supreme court of the United States in *Munn v. People*, *supra*, and in our opinion, it was error in the circuit court to dismiss the bill for want of equity, and error in the appellate court to affirm the decree of dismissal.

The judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court for further proceedings in conformity with this opinion, and with leave to both parties to take such further testimony as they may deem advisable.

PUBLIC POLICY. — Under a statute declaring that telegraph companies shall receive dispatches from and for other telegraph lines, and from and for individuals, and transmit them with impartiality and good faith, a contract between a telephone company and the owner of telephone instruments, providing that the company in the use of the instruments shall discriminate as between telegraph companies, is void as against public policy: *State v. Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583, and note 587; to the same effect, substantially, is *American etc. Tel. Co. v. Connecticut etc. Tel. Co.*, 49 Conn. 352; 44 Am. Rep. 237, and note 241-243.

GAGE v. STEWART.

[127 ILLINOIS, 207.]

TAX SALES — RETROSPECTIVE LAWS. — A statute declaring that hereafter no purchaser at a tax sale shall be entitled to a deed, unless he has complied with certain conditions designated in such statute, applies to sales previously made for which no deed has issued, and for which the landowner yet retains the right of redemption. Such statute is not retrospective, for it relates exclusively to acts to be performed after its passage. Neither is it void as impairing the obligation of a contract.

BILL to set aside a cloud upon title arising from certain tax sales and deeds.

Augustus N. Gage, for the appellant.

H. S. McCartney, for the appellee.

SHOPE, J. This was a bill filed by appellees to set aside, as clouds upon their title to certain lots in the city of Chicago, three certain tax deeds held by appellant. An answer was filed to so much of the bill as related to two of said deeds, and a demurrer interposed to the residue of the bill, which averred the invalidity of the third of said deeds,—which demurrer was overruled by the court. Appellant electing to abide by his demurrer, the cause was heard upon the issues presented by the answer, and a decree rendered in accordance with the prayer of the bill.

The only questions here presented relate to the overruling of the demurrer, and the rendering of the decree upon the allegations of the bill as to the last of said deeds.

The deed in controversy bears date March 9, 1881, and is based upon a sale for taxes made October 21, 1878, and from which redemption expired October 21, 1880. The bill, after setting forth the title of appellees, alleges that defendant claims title under said deed; that it is void; that in making proof to the county clerk preliminary to its execution, appellant did not comply with the law, for the reason that the affidavit and notice filed for that purpose (copies of which are attached as exhibits, and made part of the bill) are defective, and insufficient in law to authorize the making of said deed. Specific objections thereto are alleged, among which is that no notice was shown to have been given to the owner of the lots, or proof filed that upon diligent inquiry he or they could not be found in the county, etc.

The question is fairly presented by the bill and demurrer thereto, whether, in respect of this particular deed, service of notice upon the owners of or parties interested in the land or lots must be shown, or that upon diligent inquiry he or they could not be found in the county, or that some person in the actual occupancy of the premises, as tenant of the owner, or holding possession under him or them, was served with notice, must be made to appear by the affidavits filed, before the clerk could lawfully execute the deed. That compliance with the statute is a prerequisite to the making of a valid tax deed has been so repeatedly held that no discussion thereof is necessary: *Holbrook v. Fellows*, 38 Ill. 440; *Gage v. Bailey*, 100 Id. 530; *Frew v. Taylor*, 106 Id. 159.

The difficulty arises in determining what were the requirements in this particular instance. What the notice must contain, upon whom and when it is to be served, with the manner of service, is prescribed by section 216 of the revenue act; and if that section, as amended by the act of the legislature of May 31, 1879 (in force July 1, 1879), is to control in this case, it is substantially conceded, as it must be, that the demurrer was properly overruled.

The requirements of the section as amended, not included in the act in force at the date of such sale, are, that service of notice shall be had upon "the owner of or parties interested in said land or lot, if they can, upon diligent inquiry, be found in the county," etc. Provision is made for publication in case the land or lot is unoccupied, or the person in whose name it is assessed, or the owners or parties interested therein, cannot be found in the county, or if the owners, etc., are unknown to the purchaser or his assignee, publication may be made, as to them, as unknown owners, etc. No service of notice, by publication or otherwise, upon the owners, was shown by the affidavit filed, nor was it shown that upon diligent inquiry they could not be found in the county.

It is insisted that the sale occurring October 21, 1878, the law then in force will control in the subsequent proceedings necessary to maturing the tax title, and therefore no notice to the owner was required to be shown as a prerequisite to the making of the deed. We are of opinion that the section of the act of 1879 was intended to take effect *in præsentis* as to all notices served or to be served thereafter, and to apply to all purchasers at tax sales, and their assignees, irrespective of when the sale for taxes was made. This is, we think, the clear import of the language employed. The provision is not in respect of sales thereafter to be made, but is, that "hereafter no purchaser, or assignee of any such purchaser, of any land or lot, for taxes, etc., at any sale," etc., shall be entitled to a deed until he shall have complied with the conditions prescribed in that section of the statute. The amended act applied to all steps to be taken after it went into effect, and which could be performed according to its requirements. Nor does this construction give the act a retrospective operation, as seems to be supposed. The rule undoubtedly is, that a retrospective effect will not be given to the statute unless the legislative intent that it shall so operate is clearly manifested. But no such effect is sought to be given this statute. The

statute, for the better protection of those having the right of redemption, required that notice be served upon the owner, if to be found in the county, at least three months before the expiration of redemption. No other change affecting the right of the purchaser or holder of the certificate of purchase is wrought by this amendment. It in no way affects or applies to the sale, or any of the precedent steps in the proceeding, lawful under the former statute, but relates exclusively to acts to be performed by the purchaser, or his assignee, subsequent to its taking effect, and by the performance of which his inchoate right in the land, under his certificate of purchase, might ripen into a title. These requirements—of giving notice of the sale, when redemption will expire, and making proof thereof to the clerk—are in the nature of remedies to be pursued by the purchaser or holder of the certificate of purchase to mature and perfect his title to the land under the tax sale. As to all these acts, which could be performed by the purchaser, or his assignee, after the statute became in force, it would necessarily operate prospectively: *Bac. Abr., Statute 9.*

The cases of *Stamposki v. Stanley*, 109 Ill. 210, and *People v. Thatcher*, 95 Id. 109, are not in point. Those cases would be authority for the contention of counsel if the time of redemption had expired in this case prior to the act of 1879 going into effect, or if sufficient time had not intervened between that act becoming the law and the expiration of redemption in which to give the prescribed notice. Here no such question arises, the act as amended having been in force more than a year before the notice was required to be given.

For the same reason, the position of counsel that the act of 1879, if held applicable to this case, would be void, as impairing the obligation of the contract between the state and the purchaser at the tax sale, is not well taken. It is clearly competent for the legislature, in its discretion, to regulate or change the methods of conducting the public business, and to impose such restrictions and conditions upon those having contracts with the state as public policy may demand, although such restrictions, conditions, or changes may require the observance of new forms by the public officers or by the party to the contract. The exercise of such power is, in effect, the same as that which may be exercised in respect of remedies for the enforcement of contracts, which, within the limitation that the right itself shall not be impaired, is to be

regarded as within the legislative control: Cooley's Constitutional Limitations, 5th ed., 350, 443, and cases cited.

A law which would deprive the party of all legal remedy, or impose impossible conditions to the assertion of his right, would necessarily be void. The power of the legislature over the subject under consideration is necessarily subject to the limitation that every provision of substantial benefit in the contract must be preserved. No new condition could be imposed requiring the payment of additional consideration, or that would hinder or prevent the purchaser or his assigns from acquiring title or extending the time of redemption: *Gault's Appeal*, 33 Pa. St. 94; Cooley on Taxation, 369, par. 11. But the change made by the legislature in no way interfered with the rights under the contract. The rights of the land-owner are not enlarged, or those of the holder of the tax certificate diminished. He is required simply to comply with the new forms, to serve notice upon a party upon whom service was not before required by law, and ample time is given for compliance. By the observance of this formality, his rights are preserved to him unimpaired. This in no way impairs the obligation of his contract: *State v. Hundhausen*, 24 Wis. 196.

From what has been said, it is apparent that, in our opinion, the act of 1879 was applicable, and the holder of the certificate of purchase was required to give the notice therein prescribed, and make proof thereof as required by the 217th section of the revenue act; and not having done so, the deed was properly held void.

The decree will therefore be affirmed.

STATUTES. — A retrospective construction of a statute is never allowable, unless the intent that it shall so operate appears plainly upon its face, and this rule applies even to remedial statutes: *Richmond v. Henrico County*, 83 Va. 204. See cases cited in the opinion of the principal case.

CONTINENTAL INSURANCE COMPANY v. RUCKMAN.

[127 ILLINOIS, 364.]

INSURANCE — IF PROOFS OF LOSS ARE SERVED AND RETAINED BY AN INSURANCE COMPANY WITHOUT OBJECTION, and the company refuses to pay the loss upon some other grounds than defects in the proofs, all further performance of the conditions in relation to proofs of loss is waived, and the company is estopped from making any formal objections to the proofs.

INSURANCE — GENERAL AGENTS, WHO ARE. — One representing an insurance company in a particular locality, and supplied with blank policies properly signed by the company, which he is authorized to fill up, countersign, and deliver to the assured, is a general agent in the matter of soliciting and accepting risks and agreeing upon a settlement of terms of insurance, and carrying such agreement into effect by the issuing of policies.

A GENERAL AGENT OF AN INSURANCE COMPANY WILL BE PRESUMED TO POSSESS competent authority to stipulate for an insertion in an insurance contract of a clause relating to the occupancy of the buildings to be insured.

INSURANCE — LIMITATION OF POWERS OF AGENTS. — A condition in a policy of insurance that "it is further understood and made a part of this contract that the agent of this company has no authority to waive, modify, or strike out of this policy any of its printed conditions," does not have the effect of limiting the power of an agent of a company to make an agreement before the issuing of the policy, that it shall contain a condition permitting the building insured to remain vacant a specified length of time, without constituting a breach of the policy. The condition in question is merely a limitation upon the powers of the agent to waive or modify the terms of a policy after it has been issued.

INSURANCE — GENERAL AGENT OF INSURANCE COMPANY MAY DELEGATE HIS POWER TO A CLERK, ASSISTANT, OR SUBAGENT to the extent of authorizing the latter to agree that a policy to be issued shall contain a condition permitting the buildings insured to remain vacant for a period not exceeding thirty days without notice to the insurer.

INSURANCE — A STATUTE MAY MAKE FOREIGN INSURANCE COMPANIES RESPONSIBLE FOR THE ACTS of those who assume to aid them in the transaction of their business, and this is the effect of the statute of the state of Illinois declaring that "the term 'general agent' used in this section shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any way aid in transacting the insurance business of any insurance company not incorporated by the laws of this state."

INSURANCE — REFORMATION OF POLICY. — Where a clerk of a general agent of an insurance corporation agreed with an illiterate man to issue him a policy which should contain a condition that the buildings insured might remain vacant and unoccupied thirty days without notice to the insurer, and such clerk delivered a policy to the insured which he represented as containing the stipulation agreed upon, but which in fact contained a condition that if the buildings insured became unoccupied without the consent of the company's indorsement thereon, the policy should become void, it was held, after a loss had occurred, that a suit might be main-

tained to reform the policy so as to conform it to the agreement made with the assured before its issuance, and that a recovery might be had in the same suit upon the policy as thus reformed.

BILL in chancery for the reformation of a policy of insurance, and for a decree for the amount of loss sustained by the assured. Decree in favor of the complainant.

Baker, McNulty, and Bo'er, for the appellant.

Wise and Davis, for the appellee.

BAILEY, J. This was a bill in chancery, brought by Stephen Ruckman against the Continental Insurance Company of the city of New York, praying for the reformation of a policy of insurance, and for a decree for the amount of the complainant's loss and damage by fire to the property insured. The policy in question bore date March 24, 1884, and insured the complainant, for the term of three years, against loss or damage by fire, in the sum of four hundred dollars on his one-story, frame, shingle-roof dwelling-house, and six hundred dollars on his log barn, situate in St. Charles County, Missouri. The following facts shown by the complainant's evidence are in no way contradicted:—

The policy was obtained by the complainant from the defendant through the agency of one Milne, an employee of Whipple and Smiley, the defendant's local agents at Alton, Illinois. On the day next prior to the date of the policy, Milne came to the complainant at his place in St. Charles County, Missouri, and solicited said insurance. The complainant expressed a willingness to take out a policy on said buildings, but told Milne that he expected to have them rented, and that sometimes they might be vacant five, ten, or fifteen days, and asked him if that would make any difference with the insurance. Milne assured him that if they did not remain vacant to exceed thirty days, the insurance would not be affected, and agreed that the policy should so provide; but that if the vacancy should continue for a longer period, it would be necessary for the complainant to notify the company, and get a permit for a further period of thirty days. On these terms, the complainant agreed to take the policy. The next day he went to the office of Whipple and Smiley for the policy, and found Milne there alone, no other person being in the office. Milne thereupon took a blank policy, filled it up, and delivered it to the complainant, and received from him the premium. The complainant is an illiterate man, not

being able to read or write, and that fact was known to Milne at the time he filled up and delivered the policy. On receiving it, the complainant asked Milne whether the clause in relation to the vacancy of the buildings was in it, and was told by him that it was; and the complainant had no knowledge that the contrary was the fact until after the destruction of the buildings by fire.

In point of fact, the condition agreed upon was not in the policy, but among its conditions was one providing that if the buildings insured became unoccupied without the consent of the company indorsed thereon, the policy should be void. A tenant, who went into possession March 1, 1885, continued to occupy the premises, using the house for a dwelling and the barn for keeping therein his domestic animals, his hay, and other personal property, until October 21, 1886, at which date he moved out of the house, leaving it unoccupied, and moved into another house about a quarter of a mile distant therefrom. On the first day of November, 1886, the house and barn were both destroyed by fire, the house at that time remaining unoccupied, the former tenant, however, still retaining the key to the barn, which he kept locked, and having therein a load of hay, a hay-frame, twelve bushels of potatoes, and some lumber. Proofs of loss were furnished by the complainant to the insurance company, showing that the house was unoccupied at the date of the loss; and the defendant thereupon refused to pay the loss, basing its refusal upon the alleged breach of the condition of the policy relating to the occupancy of the buildings.

The cause was heard on pleadings and proofs, and a decree rendered reforming the policy by inserting therein a provision that the buildings insured might remain vacant and unoccupied thirty days, but no longer, without notice to the defendant, and also decreeing that the defendant pay the complainant, within ten days, the sum of \$1,049.50, with legal interest thereon from the date of the decree, together with costs of suit, and that, in default of such payment, execution issue therefor. From this decree the defendant appealed to the appellate court, where said decree was affirmed, and, by a further appeal, the defendant has brought the record to this court.

It is urged as a ground for the reversal of the decree that the complainant failed to perform the condition of the policy in relation to preliminary proofs of loss. It is not disputed

that proofs were served consisting of a statement in relation to the circumstances of the loss, made by the complainant under oath, and a certificate by a justice of the peace residing in the vicinity of the buildings destroyed. It may be that these proofs failed in some particulars to answer all the requirements of the policy; but whether they did or not is wholly immaterial, since the defendant, on receiving the proofs, instead of pointing out the deficiencies therein, and requiring a further statement and certificate, refused to pay the loss, placing its refusal wholly upon the ground that the condition prohibiting a vacancy of the buildings without notice and consent had been broken. Where proofs of loss are served, and retained by the insurance company, without objection, and the company refuses to pay the loss, placing its refusal upon some ground other than defects in the proofs, any further performance of the condition in relation to proofs is waived, and the company is estopped, when sued on its policy for the loss, to make any formal objections to the proofs: *Lycoming Fire Ins. Co. v. Dunmore*, 75 Ill. 14; *Williamsburg City Fire Ins. Co. v. Cary*, 83 Id. 453; *German Ins. Co. v. Ward*, 90 Id. 550; *Phoenix Ins. Co. v. Tucker*, 92 Id. 64; 34 Am. Rep. 106; *Grange Mill Co. v. Western Assurance Co.*, 118 Ill. 396; *Scammon v. Commercial Ins. Co.*, 20 Ill. App. 500.

The ground, however, for a reversal of the decree upon which reliance is chiefly placed by the defendant is, that Milne was not the defendant's agent, and had no authority to stipulate on its behalf for a clause in the policy permitting the buildings insured to become and remain vacant and unoccupied for thirty days without invalidating the insurance. The contention is, that Milne was merely an agent or employee of Whipple and Smiley, and that the maxim, *Delegatus non potest delegare*, applies. Whipple and Smiley, though representing their principal in a particular locality or within a limited territory, and therefore called local agents, were in fact general agents of the defendant in the matter of issuing policies. They were not only appointed agents, but supplied with blank policies properly signed by the company, which they were authorized to fill up, countersign, and deliver to the assured. The rule is well established that this constituted them the general agents of the insurers in the matter of soliciting and accepting risks, agreeing upon and settling the terms of insurance, and carrying the same into effect by issuing the

policies: *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Gratt. 88; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. 292; *Aetna Ins. Co. v. Maguire*, 51 Ill. 342; May on Insurance, sec. 126.

Whipple and Smiley, possessing as they did the powers of general agents in the matter of making contracts of insurance and issuing policies, will be presumed to have possessed competent authority to stipulate for the insertion, in the insurance contract with the complainant, of the clause in question, relating to the occupancy of the buildings to be insured. Such stipulation was clearly within the apparent purview of their agency, and unless there were limitations upon their authority of which the complainant had notice at the time the contract was made, the defendant cannot now set up want of authority in them.

But it is said that the complainant was notified by the terms of the policy which he received that no agent of the insurance company had authority to enter into a contract of insurance upon any other terms or conditions than those embodied in the blank policies furnished by the defendant to Whipple and Smiley. Those blanks, it is true, contained the following condition: "It is further understood and made a part of this contract that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions." That this clause cannot have the effect here contended for, is apparent from either of two considerations. At the time the contract of insurance was agreed upon, which was the day next prior to the delivery of the policy, the complainant, so far as the evidence shows, had no notice that any such clause was contained in the company's blanks. And it is doubtful whether even the delivery of the policy to him was notice of its contents, when that fact is taken in connection with his inability to read it, and Milne's assurance that it was draughted in accordance with the contract. The other reason is, that the clause above quoted, when the printed conditions of the policy are subjected to the strict rule of interpretation which properly applies to them, neither is nor purports to be a limitation upon the power of the company's agents in agreeing upon and settling the terms of the contract of insurance. It is a limitation upon powers of agents to waive, modify, or strike from the policy any of its printed conditions. A waiver is the voluntary yielding up by a party of some exist-

ing right, but until the contract is consummated, the company has no rights which are susceptible of waiver, nor can any condition be properly said to be modified or stricken from a policy until there is a policy; that is, until after the terms of the contract have been agreed upon and the policy issued. Clearly the clause in question was intended as a limitation upon the powers of agents to waive or modify the terms of a policy after it had been issued, and not upon their power to agree upon and settle the terms of the policy prior to its issue.

Whipple and Smiley being general agents, could they employ Milne to perform the duties of their agency, and make his acts binding on the defendant? The facts are, that Whipple was a gentleman advanced in years, who gave but little attention to the duties of the agency. Smiley was an employee in the Alton National Bank, and during banking hours his duties usually required his attendance at the bank. Under these circumstances, Milne was employed by the firm to assist them in their insurance business. He did the general office-work, kept the books of the firm, conducted their correspondence, received the premiums paid at the office, and to some extent collected those which were paid elsewhere; filled up policies, all except countersigning; and the evidence tends to show that whenever he could he acted as solicitor for the firm in procuring insurance, and that when he had negotiated a policy with any particular person, and expected him to call for it, he would so inform the firm, and a blank policy duly countersigned would be left with him, to be by him filled up and delivered. The employment of Milne by the firm, and the general nature of his duties, seem to have been known to the defendant, as the defendant's state agent is shown to have frequently visited the office of the firm while Milne was in its employ.

As to whether, under these circumstances, general agents can delegate their authority so as to bind their principal by the acts of their subagent, the authorities are not altogether agreed. The position taken by defendant's counsel which is entitled to most consideration is, that agents to whom is committed duties which require the exercise of judgment and discretion cannot delegate their authority, for the reason that such agency is, from its nature, personal, the principal having contracted for the personal skill and judgment of the agents selected. In support of this view, we are cited to a very able discussion in *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App.

148, where it is held that a general agent, with power to issue policies of insurance, the signing and delivery of which involve passing upon the character of risks, and consequently call for the exercise of discretion and judgment, cannot delegate his powers as such agent to another.

Without expressing any dissent from the doctrine of that decision and others which take a similar view, we are of the opinion that the present case falls within a quite different rule. In that case, the question was, whether any valid policy had been issued by the defendant to the plaintiff. The acts there challenged as having been performed by virtue of a delegated authority embraced the passing upon the character and desirability of the risk, and its acceptance on behalf of the insurer,—acts clearly involving the exercise of discretion and judgment. In the present case, no question is raised as to the validity of the policy as issued. No fault is found with the character of the risk, nor is the validity of Milne's acts by which it was accepted and the policy executed in any way challenged. The defendant received the premium, and keeps it, and proceeds upon the assumption that the policy was properly issued, and correctly embraces the terms of a valid contract of insurance with the complainant. The defense is based solely upon an alleged breach of one of the conditions of the policy, and the question raised involving a consideration of Milne's authority to bind the defendant relates merely to the clause as to the occupancy of the buildings which he agreed to insert in the policy. We have to determine, then, whether Whipple and Smiley could properly delegate their authority to Milne to that extent only, no other question as to the delegation of their authority being in issue. We are unable to see that this was a matter specially calling for the exercise of discretion or judgment. The complainant's buildings, so far as the question of non-occupancy was concerned, differed in no material respect from all other buildings similarly situated.

The case comes more nearly within the principle of *Bodins v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566. There the original policy provided that no insurance, original or continued, should be binding until the actual payment of the premium. The defense was based upon the non-payment of the premium upon a renewal receipt, and the plaintiff's claim was that the clerk of the insurance agent who delivered to him the receipt waived the prepayment of the premium. The only question was as to the authority of the clerk to make

such waiver. He was the son of the insurance agent, and had for several years been assisting his father in his insurance business, among other things by procuring policies and renewal receipts from the company, and delivering them to the insured. In various cases, including the one in question, he had, with the presumed consent and authority of his father, waived the prepayment of premiums. Such delegation of authority was held to be proper, upon the principle that the act of the clerk was the act of the agent, binding on the company just as effectually as if it were done by the agent in person. The doctrine of the foregoing case was cited with approval by this court in *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; see also *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252.

In the present case the act of Milne by which he agreed to insert in the policy the clause in question relating to the non-occupancy of the buildings may be regarded as the act of Whipple and Smiley, and therefore binding on the company the same as though they had made the agreement themselves. The fact that they knew nothing of the agreement, and gave no actual assent to it, is immaterial, so long as it was within the apparent purview of their powers as agents, and also within the apparent purview of Milne's employment as their clerk and assistant.

But there is another and we think a conclusive reason why the agreement of Milne must be held to be binding on the defendant. The defendant is an insurance company organized under the laws of the state of New York, and doing business by its agents in this state under and by virtue of our statute in relation to such companies. The twenty-third section of the statute in relation to fire insurance companies, after fixing and defining the terms and conditions upon which insurance companies organized under the laws of other states may take risks or transact insurance business by their agent or agents in this state, provides as follows: "The term 'agent,' or 'agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall, in any manner, aid in transacting the insurance business of any insurance company not incorporated by the laws of this state": 1 Starr and Curtis's Stats. 1322. The general assembly, having power to impose upon foreign insurance companies coming into this state to do business such reasonable terms and conditions as it saw fit, had an undoubted

right to make such companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents and in fact aid them in the transaction of their insurance business. That such was the intention of the statute seems too plain to admit of doubt. We placed this construction upon said statute in *People v. People's Ins. Exchange*, 126 Ill. 466.

Similar statutes have been upheld in other states, and have there received the same construction we are disposed to place upon our own. A statute of Wisconsin provided that whoever solicited insurance on behalf of an insurance company, or made any contract of insurance, or in any manner aided or assisted in making such contract, or transacted any business for the company, should be held to be an agent of such company to all intents and purposes. In *Schomer v. Hekla Fire Ins. Co.*, 50 Wis. 575, the court, in construing said statute, say: "The obvious intention of the legislature is to make an insurance company responsible for the acts of the person who assumes really to represent and act for it in these particulars, and to change the rule of law that the insured must at his peril know whether the person with whom he is dealing has the power he assumes to exercise, or is acting within the scope of his authority." Said statute was upheld, and the same construction adhered to in *Knox v. Lycoming Fire Ins. Co.*, 50 Wis. 671; *Alkan v. New Hampshire Ins. Co.*, 53 Id. 136; and *Body v. Hartford Fire Ins. Co.*, 63 Id. 157.

A statute of Iowa provided that any person who should solicit insurance or procure applications therefor should be held to be the soliciting agent of the insurance company. In *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600, it appeared that an agent of the company who had authority to solicit insurance and issue policies sent his clerk to solicit a risk and take an application, and the clerk knew that there was other insurance on the property, but the agent, who was ignorant of such other insurance, issued a policy and collected the premium, and it was held that the company was bound by the knowledge of the agent's clerk, who, for the purposes of that policy, must, by virtue of the provisions of the statute, be regarded as the company's soliciting agent.

An attempt is made to distinguish our statute from those considered and construed in the cases above cited, because of the use of the word "acknowledged" in the phrase "acknowledged agent, surveyor, broker, or any other person or persons

who shall in any manner aid in transacting the insurance business of any insurance company," etc. The contention is, that the word "acknowledged" qualifies the entire clause, and that the statute therefore applies to no person who is not acknowledged by the insurance company as having authority to act for it in its insurance business. It is sufficient to say that the construction contended for is so forced and unnatural as not to possess even the virtue of plausibility. It would render the statute impotent and unmeaning by limiting its operation to those who would be agents of insurance companies without it. The manifest intention was to make such companies responsible for the acts, not only of its acknowledged agents, etc., but also of all other persons who in any manner aid in the transaction of their insurance business. Nor do we see anything inequitable or oppressive in such provision. Doubtless the mere assumption of authority to act for an insurance company will not of itself charge the company with responsibility for the acts of the assumed agent. The company must in some way avail itself of such acts, so that the person performing them may be said to aid the company in its insurance business. But after a company has availed itself of the acts of an assumed agent, and thus adopted them as its own, there is nothing oppressive in assuming, as against such company, the existence of the relation of principal and agent, and charging the company with responsibility for such acts.

We are of the opinion that the circuit court properly decreed a reformation of the policy, and the property insured having been destroyed by fire, it was also proper for the court to enter a decree in favor of the complainant for the amount of his loss. We find no error in the record, and the judgment of the appellate court will therefore be affirmed.

INSURANCE—PROOFS OF LOSS.—The condition is regarded as waived as to proof of loss, where the company fails to make objection within reasonable time, or where the refusal to pay is based upon other grounds: *Firemen's Ins. Co. v. Floss*, 67 Md. 403; 1 Am. St. Rep. 398, and note 405, 406; and compare *Central City Ins. Co. v. Outes*, 86 Ala. 528, *ante*, p. 67, and note.

INSURANCE—AGENTS.—An insurance company has power to restrict the powers and duties of its agents as it may choose; and when their authority is expressly limited and restricted by the policy which the assured receives, such restrictions and limitations must be regarded as binding upon him: *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908, and note 913.

INSURANCE — AGENTS. — An insurance company is liable, not only for acts within the scope of his agency, but also for acts of others employed by such agents: *Duluth National Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76; 4 Am. St. Rep. 744; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 364.

INSURANCE POLICIES. — Equity has jurisdiction to correct mistakes in insurance policies, and a policy can therefore be reformed in equity: *Barnes v. Herbia Ins. Co.*, 75 Iowa, 11; 9 Am. St. Rep. 450, and note.

MALONEY v. DEWEY.

[127 ILLINOIS, 285.]

JUDGMENT OR DECREE OF A COURT HAVING JURISDICTION OF THE SUBJECT-MATTER AND OF THE PARTIES is conclusive and binding on such parties and their privies, notwithstanding the court may have proceeded irregularly or erred in its application of the law in the case before it.

GUARDIAN AD LITEM NEED NOT BE A SOLICITOR. The fact that the acts of such guardian after the appointment are erroneous cannot be held to relate back, and divest the court of the personal jurisdiction which authorizes it to make the appointment.

LUNATIC — SUIT MAY BE COMMENCED AGAINST A LUNATIC. — The complainant is not bound to ascertain the mental capacity of the defendant, and have a conservator appointed before bringing suit.

LUNATIC PROPERLY BEFORE THE COURT IS BOUND by acts done by matter of record, as fines, recoveries, judgments, recognizances, and the like.

LUNATIC. — **IF A DECREE IS ENTERED AGAINST A LUNATIC IN A COURT OF THE UNITED STATES** having jurisdiction over him, relief from such decree must be sought in the same court. The state courts cannot review such decree nor grant any relief therefrom.

JURISDICTION OF A COURT OF THE UNITED STATES IS NOT DIVESTED by the fact that it erroneously directs a sale without allowing the right of redemption therefrom. If relief can be obtained from such decree, it must be by application of the court which entered it.

BILL in equity by John Maloney, Jr., and Catherine Kerby against Dewey and Kents, praying that the decrees, orders, and proceedings of the United States circuit court foreclosing a certain deed of trust be declared void as to John Maloney, Jr., and William Maloney, and that an account be taken of the amount due on the deed of trust, and the complainants permitted to redeem. The grounds of recovery upon which the complainants relied were, that John Maloney, Jr., was a minor when the decree of foreclosure was rendered; that the person appointed as guardian *ad litem*, and who answered as such, was a clerk of said circuit court, and as such prohibited from acting as a solicitor, and that in fact such guardian did no act as solicitor or counselor for the defense of the rights of

John Maloney, Jr., and that they were wholly unprotected in the suit; that William Maloney, who was a defendant in said foreclosure suit, was, long before its commencement, a lunatic, and so continued until the time of his death; that after serving the process upon him in the foreclosure suit, he was adjudged insane, and a conservator appointed for him; that he was not given any day in court in which to show cause against the granting of the decree; that at the time of filing the bill to foreclose, no default had been made whereby any power to sell under the trust deed had accrued; that after the entry of such decree, the defendant, William Maloney, died, and that the complainants in the present suit are his only heirs at law. A demurrer was interposed to the bill, and was sustained by the trial court.

Edward Roby and Thomas Gault, for the plaintiffs in error.

Mason Brothers, for the defendant in error.

SCHOLFIELD, J. This bill collaterally attacks the validity of a decree of the circuit court of the United States. It alleges, for reasons hereafter to be noticed, that such decree is void, and therefore claims the right of those representing the makers of the trust deed to redeem from it, just as if that decree had never been rendered. The general rule is, that where it is once made to appear that a court has jurisdiction, both of the subject-matter and of the parties, the judgment or decree which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law in the case before it: Cooley on Constitutional Limitations, 1st ed., 408 et seq. There are cases which seem to be exceptional to this rule, but which perhaps are not, when rightly considered, where the court, although having jurisdiction of the person, and jurisdiction to adjudicate, when properly brought before it, upon the subject-matter, renders a judgment not authorized by law in that class of cases, under any possible proofs,—as, for instance, in a common-law case; a judgment without the verdict of a jury, there appearing to have been no waiver by the parties in interest of the right to have a jury; a judgment punishing a party by imprisonment in the penitentiary, under an indictment for a riot, and a verdict of guilty thereunder. In such cases, it may, perhaps, in a technical sense, accurately enough be said that the court

has no jurisdiction of the subject-matter of the particular judgment. But whether these cases fall strictly within the general rule, or form exceptions to it, can be of but little importance, in a practical point of view, so long as the grounds on which they rest are understood and kept in mind. They are not instances of mere misapplication of law to particular facts, or erroneous interpretation of rules in particular cases, but they are attempts to exercise an authority which has no existence in the particular case under any possible state of proofs: See *Windsor v. McVeigh*, 93 U. S. 282; *Lloyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179.

That there was jurisdiction in the United States court to render the decree of foreclosure, the complainant being a citizen of Wisconsin, and the defendants citizens of this state, if there was jurisdiction of the defendants, is not denied; but it is contended, on behalf of plaintiffs in error, that there was not jurisdiction of the defendants; because,—1. The summons that was issued was void by reason of not being returnable at a day during the term at which it was issued; 2. The guardian *ad litem* appointed for John Maloney, Jr., was clerk of the court, and therefore prohibited from practicing as a solicitor in chancery; 3. William Maloney was insane at the time he was served with process and the decree was rendered; 4. It does not appear that the summons was properly served.

The first and fourth objections are not based on any allegations in the bill, and should, on that ground, be disregarded. We will add, however, that in our opinion they would have been untenable if they had been alleged, because they are not sustained by the record.

We are not aware of any statute or ruling of any court which requires that a guardian *ad litem* shall be a solicitor. Counsel for plaintiffs in error have called our attention to none, and in our opinion there are none. The acts of a guardian *ad litem*, after appointment, may be erroneous; but however much so, they cannot be held to relate back, and divest the court of the personal jurisdiction which authorized it to make the appointment. After inquisition, and the appointment of a conservator for a lunatic, a party filing a bill to enforce the contracts of such lunatic should make the conservator a party. But until inquisition and the appointment of a conservator, it is competent to commence suit against the lunatic. The complainant is not bound to ascertain the mental capacity of the defendant, and have a conservator appointed, before

he can bring suit: *King v. Robinson*, 33 Me. 114; 54 Am. Dec. 614.

It is provided by section 6 of our chancery code (R. S. 1874, 199) "that in any cause in equity it shall be lawful for the court in which the cause is pending to appoint a guardian *ad litem* to any . . . insane defendant in such cause," etc. But this is not made jurisdictional, and, obviously, it can have no application where a conservator has been appointed and is acting, or where the complainant had no knowledge of the insanity. The record here shows that there was no inquisition, and no appointment of a conservator, until after the summons was served; and there is neither averment nor proof that Dewey had any knowledge of William's insanity before the decree was rendered.

It has been held that where an insane person has been properly before the court, "acts done by matter of record, as fines, recoveries, judgments, statutes, recognizances, etc., shall bind as well the idiot as he who becomes *non compos mentis*": *Beverly's Case*, 4 Coke, 123; *Mansfield's Case*, 12 Id. 124; Fonb. Eq., b. 1, c. 2, sec. 2, note k. See *King v. Robinson*, 33 Me. 123; 54 Am. Dec. 614.

It is said that judgments against lunatics are neither void nor voidable (Freeman on Judgments, sec. 123), and that the proper remedy for a lunatic is to apply to chancery to restrain the proceedings, and to compel the plaintiff to go there for justice: Id. So, also, the same author, in a note to *Allison v. Taylor*, 32 Am. Dec. 70, in speaking of a judgment against a lunatic, says: "Unless set aside in chancery, or by some other appropriate remedy, a judgment against a lunatic is of unquestionable validity: *Lamprey v. Nudd*, 29 N. H. 299; *Wood v. Bayard*, 63 Pa. St. 320; *Foster v. Jones*, 23 Ga. 168; *Sacramento Savings Bank v. Spencer*, 53 Cal. 737; *Stigers v. Brent*, 50 Md. 214; 33 Am. Rep. 317; *Johnson v. Pomeroy*, 31 Ohio St. 247. If an attempt were made to vacate or enjoin such judgment in chancery, doubtless the mere insanity of the judgment defendant would not be a sure garranty of success. It would require the aid of other facts, from which the conclusion must follow that the judgment is inequitable, and cannot be executed without injustice." But since, in this case, it is the decree of a court of chancery, and not the judgment of a court of law, that is affected by the insanity, the requisite equitable jurisdiction is in the same court, and that court has all the jurisdiction that any court can have to relieve

against any harm resulting from the decree. The decisions in this state and in other states are numerous to the point, and hold that there is no authority in the courts of one state to review, or to revise and supplement and correct, the decrees of courts of other states or of the United States: *Hanna v. Read*, 102 Ill. 596; *Wetherbee v. Fitch*, 117 Id. 67; *Ritchie v. Pease*, 114 Id. 353; *Sproehle v. Dietrich*, 110 Id. 202; *Logan v. Lucas*, 59 Id. 238; *Munson v. Harroun*, 34 Id. 422; 85 Am. Dec. 816; *In re Salisbury*, 16 Id. 351. Necessarily, therefore, if William Maloney was injuriously affected by the decree, those representing him should have applied to the court rendering the decree to open it, and let them in to be heard.

The objection is urged that the decree rendered is erroneous, because it directs a sale without redemption. But that error does not divest the United States circuit court of jurisdiction of the case. The remedy is to apply to that court. What effect that error might have were this a suit at law, and the claim were made that the deed from the master was void because of such error, we will not undertake to decide. But this is a proceeding in equity to redeem from a deed of trust that a federal court has foreclosed. Whether the decree is erroneous in respect of the order of sale or not cannot affect the jurisdiction of that court to render final decree. If this decree should be reversed on review or error, that court would still have the exclusive jurisdiction to render final decree in the case, and necessarily, therefore, some other court could not have jurisdiction to render a decree that redemption under the deed of trust be allowed. The right of redemption is involved in the question of foreclosure. No decree can be rendered in such a case without passing upon it, and the court first obtaining jurisdiction to pass upon it must retain that jurisdiction to the end: *Ex parte Jenkins*, 2 Wall. Jr. 521; *Wallace v. McConnell*, 13 Pet. 151.

Other objections urged against the decree involve merely questions of erroneous rulings unaffected by the question of jurisdiction, and cannot therefore be considered in this collateral way.

The decree is affirmed.

JUDGMENTS — RES ADJUDICATA — CONCLUSIVE UPON THE PARTIES AND PRIVIES. — Former judgment binds the parties to such judgment and their privies, whether by blood, estate, or law: *Woods v. Montevallo Coal and T. Co.*, 84 Ala. 560; 6 Am. St. Rep. 393. Where a court has jurisdiction to render a judgment or decree, it is conclusive as to the questions adjudicated

therein, and cannot be reopened to examination or discussion, unless obtained by fraud: *Grassmeyer v. Beeson*, 18 Tex. 753; 70 Am. Dec. 309. A judgment, whether foreign or domestic, is conclusive upon the parties, where the court rendering the same had jurisdiction over both the person and the subject-matter: *Horton v. Critchfield*, 18 Ill. 133; 65 Am. Dec. 701. Where the court has jurisdiction of the subject-matter and the parties to an action, its judgment therein is conclusive until reversed on appeal, or vacated by the judgment in some proceeding instituted for that purpose: *McIver v. Stephens*, 101 N. C. 235; *Spiney v. Harrell*, 101 Id. 48. And while a judgment may be irregular, or even erroneous, yet if no objection is made to it on that particular ground, it will not be reversed: *Brooks v. Brooks*, 97 Id. 136.

GUARDIAN AD LITEM — WHEN NOT AN ATTORNEY. — A guardian *ad litem* must be appointed under the probate act of 1851 to represent minor heirs, who have no general guardian, upon the hearing of a petition for a sale of the decedent's real estate, and the appointment of attorneys to represent absent and minor heirs is without authority: *Townshend v. Tallant*, 33 Cal. 45; 91 Am. Dec. 617.

JUDGMENTS AGAINST LUKATIVES are not void, nor are they voidable: *Stigers v. Brent*, 50 Md. 215; 33 Am. Rep. 317; *Freeman on Judgments*, 152, and cases cited in note thereto.

RELIEF AGAINST DECREES MADE BY COURTS OF COMPETENT JURISDICTION must be sought for only in the courts rendering the decrees: *Kuppendorf v. Huse*, 110 U. S. 276; *Railroad Co. v. Railroad Co.*, 111 Id. 505; *Mail v. Maxwell*, 107 Ill. 554; *Munson v. Harroun*, 34 Id. 422; 85 Am. Dec. 316; and other cases cited in the opinion of the principal case.

VILLAGE OF JEFFERSON v. CHAPMAN.

[127 ILLINOIS, 438.]

CONTRACTOR — LIABILITY OF CITY FOR NEGLIGENCE. — A city is answerable to a person suffering injury from the negligent act of its contractor, if the contract required the performance of work which was intrinsically dangerous, however successfully done, or if the city was under a primary obligation to keep the subject-matter of the work in a safe condition.

ONE UPON WHOM A DUTY IS IMPOSED CANNOT AVOID HIS RESPONSIBILITY for its faithful performance by contracting with another for such performance.

MUNICIPAL CORPORATION. — DUTY OF MAINTAINING ITS STREETS IN A SAFE CONDITION for public travel rests primarily on the municipal corporation, and this duty continues, though a contract is made by it for the doing of work on such streets, and it has no immediate control over the contractor or his work. Therefore, a person injured by a defect in such streets, occasioned by the negligent act of such contractor, may recover therefor from the city.

PRESUMPTION. — WHEN WORK IS DONE ON THE STREETS OF A CITY OR VILLAGE it is presumed that it was done by the authority of such city or village.

MUNICIPAL CORPORATION CAUSING WORK TO BE DONE WHICH IN ITS NATURE IS DANGEROUS to the public must take notice of the character of

the work, and the condition in which it was left, whether safe or dangerous.

JURY TRIAL. — WHETHER A PARTY WAS IN THE EXERCISE OF ORDINARY CARE in a particular case is a question of fact for a jury.

EVIDENCE. — IN AN ACTION AGAINST A MUNICIPAL CORPORATION FOR INJURIES SUFFERED FROM A DEFECT IN THE STREET, evidence may properly be received that there were no street-lamps at the crossing where the accident occurred.

ACTION to recover from injuries sustained from a defect in the street. Judgment for the plaintiff was affirmed by the appellate court.

James M. Brown and Merritt Starr, for the appellant.

Monk and Elliott, for the appellee.

BAKER, J. Georgia Chapman, the appellee, sued the appellant, the village of Jefferson, in the superior court of Cook County, in an action on the case, for personal injuries sustained in consequence of a fall upon a cross-walk, or apron, across a ditch at the intersection of St. Charles Avenue and Center Street, in said village, and recovered a judgment for six thousand dollars damages. On appeal to the appellate court for the first district, the judgment was affirmed, and the village now, by further appeal, brings the record to this court.

The facts of the case, briefly stated, are, that late in the fall of 1885, the village employed one Goven to grade a portion of St. Charles Avenue, and dig out and deepen the ditches thereon, said improvement including the street intersection where appellee was injured. In the performance of this work the old apron, or cross-walk, over the ditch in question was taken up and the ditch deepened and widened, and, a few days before the accident, the old boards which had formed a part of the cross-walk there, replaced, without being nailed or fastened, and the middle plank of the walk being broken and decayed at its east end. Shortly after dark on the evening of December 2, 1885, appellee was passing over said apron, or crossing, and when she stepped on the edge of said middle plank, it tipped up edgewise, and her right foot and leg went down into the ditch, and she was thrown down violently backwards, and received severe and permanent injuries, involving the spinal and uterine regions of her body.

It is urged that the trial court erred in rejecting certain testimony offered by appellant. The offers of testimony in question were as follows: —

"We want to show that this work was done by contractor

without any supervision of the village authorities; that this apron was placed in its position, and in the condition in which it was at the time of this accident, by the contractors, without any supervision, or without any influence, or without consent of the village authorities."

"Now, we offer to prove by this witness, as one of the trustees of the town of Jefferson, and Henry Wolfe, as another trustee, that they were authorized by the board of trustees of the village of Jefferson to make a contract for the grading of St. Charles Avenue and Center Street at the point where the accident is alleged to have occurred; that in accordance with this authority they made a contract with one Goven for the grading of such streets; that said Goven, acting under said contract, proceeded with the work of grading said streets, and that he, in the prosecution of that work, removed the apron over the ditch where the accident was alleged to have occurred; that the village retained, by the contract, no control or supervision over the work; that said contractor proceeded with said work until the close of the second day of December, 1884, and on the evening of said day, prior to the accident, replaced the apron in the condition in which it remained at the time of said accident."

We concur in the views expressed in the opinion of the appellate court filed in the case that in each of these offers of testimony there was one essential element wanting, in that there was no intimation of a purpose or desire to prove that the work contracted for was not of itself dangerous, or would not necessarily render the street defective or unsafe or dangerous for travel, or that the removal of the apron, which formed a part of the cross-walk over the ditch, was not a necessary incident to the doing of the work contracted for. The general rule is, that the principle of *respondeat superior* does not extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over the manner of doing the work under the contract: 2 Dillon on Municipal Corporations, 3d ed., sec. 1028.

But there are exceptions to this general rule. One of these exceptions is, where the contract directly requires the performance of a work, which, however skillfully done, will be intrinsically dangerous. The principle upon which this exception depends for support is, that one who authorizes a work which

is necessarily dangerous, and the natural consequence of which is an injury to the person or property of another, is justly to be regarded as the author of the resulting injury: 2 Dillon on Municipal Corporations, 3d ed., sec. 1029; *City of Joliet v. Harwood*, 86 Ill. 110. Another exception to the general rule relieving an employer from liability for an injury occasioned by an independent contractor is where the party causing the work to be done is under a primary obligation imposed by law to keep the subject-matter of the work in a safe condition. The principle upon which this exception is predicated is, that where a duty is so imposed, the responsibility for its faithful performance cannot be avoided, and that the party under such obligation cannot be relieved therefrom by a contract made with another for the performance of such duty.

In *City of Springfield v. Le Claire*, 49 Ill. 476, this court said: "That the city may not be liable, within the meaning of the rule *respondeat superior*, for the acts of its contractors or their workmen while engaged in effecting a lawful object, is not the question here. The question is, Was there a duty resting upon the city, growing out of the franchise conferred upon it, to keep its public streets in a safe condition for the passage of travelers and others having occasion to use them? That there was is established by the charter bestowing the franchises. . . . It is a necessary corollary, from these premises, that a party receiving damage from neglect of this duty is entitled to his action. As the city is the principal in the duty imposed, it must occupy the same position when damages are claimed for a neglect of that duty. Neither the one nor the other can be shuffled off the city by their act. . . . The construction of the sewer by contract did not release the city from the obligation while in process of construction to have it so carried on as not to endanger the lives or limbs of travelers upon the street."

Dillon, in section 1027 of his work on municipal corporations, speaking of this duty of maintaining the streets in a safe condition for public travel, says: "It rests primarily, as respects the public, upon the corporation; and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others by any act of its own. Therefore, according to the better view, where a dangerous excavation is made and negligently left open (without proper lights, guards, or covering) in a traveled street or sidewalk by a contractor, under the corporation for building a sewer or other improvement,

the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect." See also *Storrs v. City of Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *City of Detroit v. Corey*, 9 Mich. 165; 80 Am. Dec. 78; *Mayor v. Brown*, 9 Heisk. 1; *Jacksonville v. Drew*, 19 Fla. 106; *Mayor v. O'Donnell*, 53 Md. 110; 36 Am. Rep. 385; and the late case of *City of Birmingham v. McCrary*, decided by the supreme court of Alabama, and published in the *Albany Law Journal*, volume 38, No. 11, page 208, in which the authorities are collated and commented upon.

In the case at bar, the village of Jefferson is organized under the general law for the incorporation of cities and villages (R. S., c. 24), and it is manifest the legal duty is imposed upon it of keeping its streets and sidewalks in a reasonably safe condition for travel. The work done by Goven was to plow up and grade the streets, and plow through and widen and deepen the ditches, and in doing such work, the cross-walks or aprons that spanned the ditches were removed. When work is done on the streets of a city or village, the reasonable presumption of fact is, that it was done by authority of such city or village: *Chicago v. Johnson*, 53 Ill. 91; *Chicago v. Brophy*, 79 Id. 277. Here the village made no offer to prove that the contract with Goven did not authorize or contemplate the removal of such cross-walks or aprons, or that such removal was not necessary and proper in the performance of the contract. In fact, the offer of evidence made admitted that Goven, "acting under the contract, and in the prosecution of the work contracted for, removed the apron over the ditch where the accident occurred." The offers were merely to show that the village retained, by the contract, no control or supervision over the work, and that the apron was placed in the position and in the condition in which it was at the time of the accident without any supervision by or consent of the village authorities. The village could not divest itself of its duty to control and supervise the improvements and repairs it directed to be made, by simply making a contract therefor. If the contractor had authority to remove the apron, then the village could reasonably have foreseen the defect created by the contractor. It was bound to know such removal would leave an open ditch, and that an open ditch of the depth and

width of that shown by the evidence across a sidewalk necessarily rendered the sidewalk unsafe for night travel, and in such case it was under obligation to the public to see, either that guards were provided, or that the apron was replaced in such condition as to make it reasonably safe for pedestrians.

We think the action of the court in refusing the proffered testimony worked no injury to appellant, as it was immaterial, and that there was no manifest error in such action.

Complaint is also made of the refusal of the court to give the fourth, fifth, and sixth instructions tendered by appellant. These instructions all embody the principle that the village could not be held negligent on account of the defect in the sidewalk and apron, without it had either actual notice, or constructive notice from lapse of time, of such defect. If a municipal corporation causes work to be done, which is, in its nature, dangerous to the public, it is bound to take notice of the character of the work and of the condition in which it is left, whether safe or dangerous: *City of Springfield v. Le Claire*, 49 Ill. 476; *City of Chicago v. Johnson*, 53 Id. 91; *City of Chicago v. Brophy*, 79 Id. 277. Therefore, under the second and third counts of the declaration, which charge active misfeasance by the village, by negligent restoration and by negligent construction, respectively, of the cross-walk, it was unnecessary to prove notice. The said several instructions were not limited to the first count of the declaration, under which notice was a necessary element of the right of action, but applied to all three of the counts alike. The instructions were properly refused, and if given, they would likely have misled the jury. It is true that in *City of Chicago v. McCarthy*, 75 Ill. 602, these identical instructions were held to properly present the law; but instructions must always be based on the facts of the particular case on trial, and in that case, the sidewalk "was properly and safely constructed and laid down" not more than seven days before the accident, while here the cross-walk was not properly and safely replaced.

It was not error to refuse the seventeenth instruction. The only degree of care that the law imposed upon appellee was ordinary care; but what is ordinary care in one condition of circumstances might not be ordinary care under other and different circumstances; and it is a question of fact for the jury whether, in the particular case, the plaintiff was in the exercise of ordinary care.

It was not error to refuse the ninth instruction. The negli-

gences in respect to which a cause of action was claimed were in suffering the cross-walk to remain out of repair, in improperly constructing the cross-walk, and in improperly replacing the cross-walk. The evidence that there were no street-lamps at the crossing was not objected to, and, besides this, it was admissible as a part of the *res gestæ*, and was competent and material evidence upon the question of due care by appellee. The proximate cause of the injury was the defective apron, and this notwithstanding the fact that if there had been a light there appellee might have avoided the accident. Under the pleadings and the evidence, it would have been misleading to have set the jury afloat on a sea of conjecture, by instructing them that if the place was not lighted, and the injury resulted solely from a failure to light the street, then they should find for the defendant.

Instruction 10 did not properly state the doctrine of comparative negligence, and there was no error in refusing it.

It is also claimed that the first instruction given at the instance of appellee was erroneous. It appears, however, from the record that no exception was taken, at the trial, to the giving of that or any other of the instructions submitted by appellee. Appellant is therefore precluded from now insisting upon this assignment of error.

The judgment of affirmance in the appellate court conclusively settles all the controverted questions of fact in the case, and that court, in their opinion, say that "the merits of the case are clearly with the plaintiff, and the verdict is well supported by the evidence." We now, in our examination of the record, find no such errors in the rulings of the trial court as require or would justify a reversal.

The judgment of the appellate court is affirmed.

NEGLIGENCE. — WHEN A QUESTION OF FACT FOR THE JURY, and when a question of law for the court: *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; *ante*, p. 87, and note. What constitutes ordinary care must be determined by the facts surrounding each case: *City of Kinsley v. Morse*, 40 Kan. 597.

MUNICIPAL CORPORATIONS. — It is the duty of a city to keep its streets and sidewalks in a reasonably safe condition for traveling purposes, and this duty cannot be evaded or cast upon others by any act of its own: *Norton v. City of St. Louis*, 97 Mo. 537.

MUNICIPAL CORPORATIONS — ACTS OF CONTRACTOR. — A city is not absolved from its duty of keeping its streets in a safe condition because it has employed a contractor to do work thereon, and the streets become unsafe through his neglect, nor because it has not accepted his work: *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453; compare *Wright v. Holbrook*, 52 N. H. 120; 13 Am. Rep. 12.

MUNICIPAL CORPORATIONS — DUTY TO LIGHT STREETS. — A city is under no obligation to light its streets, and its mere neglect to do so is not a ground of liability, unless the charter expressly imposes such duty; but inasmuch as a street partially obstructed or out of repair may be reasonably safe if lighted, but dangerous if unlighted, the fact that it was not lighted may be material upon the question of negligence: *Miller v. City of St. Paul*, 38 Minn. 124.

CLARK v. WILSON.

[127 ILLINOIS, 449.]

CONVEYANCE WILL NOT BE SET ASIDE AS A FRAUD ON THE CREDITORS OF THE GRANTOR, if it appears that he had no title at the time of making such conveyance.

UNSIGNED CERTIFICATE OF ACKNOWLEDGMENT BY NOTARY PUBLIC IS VOID, though it is attested by his seal.

EVIDENCE — ADMISSION OF GRANTOR. — Conveyance cannot be proved by admission of a person who has never been in possession of the property, but from whom the defendant has a conveyance, if the title of the defendant was perfect without such conveyance, and he has never relied thereon.

EVIDENCE. — IN AN ACTION TO SET ASIDE A CONVEYANCE AS FRAUDULENT, THE ANSWER OR CONFESSION of the grantor or grantee cannot be admitted as evidence against one who claims under them, if he has answered denying the material allegations of the bill.

ACTION to set aside certain conveyances. In the appellate court, the following opinion was delivered:—

“LACEY, J. This was a bill brought by the plaintiffs in error, judgment creditors of defendants in error, Osman J. Wilson, in aid of the assignee, for the benefit of the creditors of said Wilson, the assignee neglecting and refusing to bring the suit. It was sought by the bill to set aside certain deeds, mortgages, notes, and acknowledgments of indebtedness, executed and made by the said Wilson to different parties shortly before the execution of the deed of assignment by him, as fraudulent and void, and as in fraud of the assignment. Upon final hearing, the circuit court rendered a decree in said cause, granting complainants certain relief, and refusing certain other relief asked for. Among the matters of relief asked for by the plaintiffs in error was the setting aside, as fraudulent, a certain supposed deed, executed by said Osman J. Wilson, the assignor, and wife, prior to his assignment, December 18, 1884, to Abram Wilson, in consideration of one dollar, as named in the deed, for the west half of lot 19, in Earlville; and also a deed on the same lot, executed by said Abram Wilson and wife to Henry Boozel, one of the respondents, December 20,

1884, for consideration, named in the deed, of three thousand dollars; and also a certain promissory note, executed by the said O. J. Wilson to his son, John T. Wilson, for the sum of one thousand dollars, executed December 18, 1884, just prior to the assignment. The court below refused the relief asked as to the above-named deeds and note, and dismissed the bill as to Abram Wilson and Henry Boozel, no relief being sought as to them, except as to said deed, but held and decreed, as regards the note of one thousand dollars given to John T. Wilson, that it be allowed as a claim against the estate of O. J. Wilson, to be paid *pro rata*, the same as other claims. The above ruling and action of the circuit court are sought to be reversed on this writ of error.

"It appears from the evidence that Abram Wilson was the owner of the said half-lot in Earlville as far back as April 18, 1883, by deed to him of that date, for said lot, from the legal heirs of Benjamin Reynolds. It therefore became indispensable for plaintiff in error to show that O. J. Wilson at the same time owned the said lot in question; otherwise, he never having owned the lot, and never having any interest in it, there could be no fraud in his conveyance to his son Abram by mere quitclaim deed. It appears from the evidence that O. J. Wilson never had possession of the lot, the possession always having been in Abram. In order to show that O. J. Wilson ever had title in the said premises, the plaintiffs in error offered what purported to be the record of a deed to said lot by Abram Wilson and wife to him, dated October 20, 1883. It appeared from an examination of the record that the deed purported to have been acknowledged before a notary public, and while the notary's seal was attached to the acknowledgment, the name of the notary was not signed to it. The reading of this record in evidence was objected to by Boozel, for the reason that the acknowledgment was not signed. We are clearly of the opinion that the deed was not properly acknowledged so as to make the record evidence of the execution of the deed.

"We are also of the opinion that there was no other competent evidence of the execution of the deed. Certain witnesses — Kelley, Munson, Bliss, Poole, and Taylor — were introduced to show, by admissions of O. J. Wilson, made out of the presence of Boozel, after he had acquired title to the lot from Abram, to the effect that O. J. Wilson had been the owner of the land at one time; also McDonald, to show that prior to the time that O. J. Wilson executed the deed to Abram, Octo-

ber, 1884, and after the supposed deed from Abram to O. J., the latter claimed to own the lot. We hold that none of the above evidence was competent to prove the execution of the supposed deed from Abram to O. J. Wilson. Abram had had a complete chain of title to the lot without deraining title through O. J. Wilson, and after the deed from Abram to Boozel, he also had a complete title to the lot, without reference to the deed from O. J. Wilson to Abram, unless it can be shown that the supposed deed from Abram to O. J. Wilson had in fact been executed. The law did not require him to claim title through O. J. Wilson. He might rely on his chain of title without the latter's conveyance to Abram Wilson. Defendant in error Boozel's title was not dependent on showing that O. J. Wilson had once title, as supposed by counsel, but it was sought to prove that O. J. Wilson had once the legal title, as a starting-point to attack the title of defendant in error Boozel. Such admissions are incompetent to show the execution of the deed, either made after or before the deed from O. J. Wilson to Abram Wilson. Conveyances cannot be proved by parol evidence, and the execution of a deed cannot be proved by the admissions of persons not themselves shown to have been in privity with the title under which the grantee claims. Evidence of possession is competent to show title, but in this case O. J. Wilson never had possession of the lot. Even if admissions of the holder of the title to real estate may be competent evidence to impeach title, when made by a person while the owner is in possession, against his subsequent grantees, under certain circumstances, a question we need not decide, yet this would be an exception to the general rule against hearsay evidence, based on the ground that such admissions are made against the owner's interests, and are *res gestæ*. But this ownership must in some way be shown by evidence other than the admissions. It would be just as competent to prove agency by the admissions of the supposed agent as to allow title to be shown by the declarations of the supposed grantee. We are clearly of the opinion that the execution of the deed cannot be proved by showing the state of the accounts between O. J. and Abram Wilson. That throws no light on the subject. The plaintiffs in error cannot invoke either the answer to the bill of O. J. Wilson or the default of Abram Wilson, as admitting the title against their co-respondent, Boozel, the latter not admitting in his answer title in O. J. Wilson at any time. The matter must be regarded, conform-

ably to the rules of pleading, as though expressly denied. Plaintiffs in error are put on their proof. The plaintiffs in error having failed to prove the allegations of the bill, and to show the execution of the deed from Abram to O. J. Wilson, the question of fraud on the part of O. J. in the execution of his quitclaim deed to Abram becomes immaterial, there appearing to be a complete title in Boozel. Without such deed it would be improper to set aside Boozel's title, and subject the lot to sale for the payment of O. J. Wilson's debts.

"There only remains to determine whether the one-thousand-dollar note given by O. J. Wilson to John T. Wilson was given for a *bona fide* debt. The evidence on this point is quite voluminous, and we have examined it with care, but find nothing in it to convince us that the court below erred in holding that the note was given for a *bona fide* consideration. It would serve no purpose to canvass the evidence in detail, and therefore we omit to do so. The allowance of the claim, payable *pro rata*, is also proper under the circumstances.

"We, upon the whole case, are satisfied with the decree of the court below. The decree is therefore affirmed."

From this decree an appeal was taken.

Bull and Strawn, for the appellant.

Mayo and Widmer, for the appellee.

By COURT. We have thoroughly examined the record in this case, and carefully considered the printed arguments filed on behalf of the different parties, and have thereupon determined that the judgment of the appellate court shall be affirmed. The foregoing opinion is approved and adopted as a sufficiently accurate expression of our views upon the questions arising upon the record.

Our statute gives the form of an acknowledgment of deeds, which it declares shall be sufficient, and it requires the officer to subscribe his name to the certificate (R. S. 1874, c. 30, sec. 26, entitled "Conveyances"), and the only safe rule is to require this in all cases of statutory acknowledgments: *Mars-ton v. Brashaw*, 18 Mich. 81; 100 Am. Dec. 152. See also Freeman's note to *Livingston v. Kettelle*, 41 Id. 173, under the head of "Signing and Sealing by Officer."

Under the facts of this case, even the answer of Abram Wilson, made under oath, pursuant to a prayer of the bill, could not be read in evidence against his co-defendant, Boozel: *Rust*

v. *Mansfield*, 25 Ill. 297. To allow his default to have an effect which his answer under oath could not have, would be contrary to all principle. The decree *pro confesso* against him can affect no one else, because it is not alleged in the bill that in any view he has a present interest in the property that can be affected by the decree. The theory of the bill is, that, in equity, the property is that of O. J. Wilson, while the answer of Boozel claims that it is his. Abram Wilson was a mere conduit through which the title passed.

The fact that the evidence as to the consideration of the one-thousand-dollar note given by O. J. Wilson to John T. Wilson was given orally before the trial court is a material circumstance to be considered in a case like the present. The court can determine much from the appearance and manner of the witness while testifying as to his candor; and if John T. Wilson testified the truth, his note is *bona fide*, and he stands on an equal footing with other creditors.

The judgment is affirmed.

OFFICIAL CERTIFICATE. — A certificate of acknowledgment to a deed is not valid unless subscribed by the acknowledging officer, and his name merely written in the body of the certificate is not sufficient: *Marston v. Brashers*, 18 Mich. 81; 100 Am. Dec. 152; note to *Livingston v. Kettelle*, 41 Id. 173.

GANNON v. PEOPLE.

[127 ILLINOIS, 507.]

CRIMINAL LAW. — CIRCUMSTANTIAL EVIDENCE considered and held to be sufficient to sustain conviction for murder.

CRIMINAL LAW. — EVIDENCE THAT A MOTHER, UPON BEING INFORMED OF THE DROWNING OF A CHILD, EXCLAIMED IN THE PRESENCE OF HER HUSBAND, ALFRED: "I knew it, I knew it; my heart has ached for two hours, O Alfred"; and that he then caught her and told her "to hush and not take on," — is admissible on the trial of the husband for the murder of such child.

EVIDENCE. — CONVERSATION BETWEEN HUSBAND AND WIFE OVERHEARD BY A THIRD PERSON may be given in evidence by him, though neither of them would have been permitted to disclose it.

CRIMINAL LAW. — DENIAL OF INSTRUCTIONS CONCERNING THE SUPPOSED REMARKS OF COUNSEL; about which the record is silent, cannot be considered on appeal.

CRIMINAL LAW. — JUDGMENT OF CONVICTION FOR MURDER WILL NOT BE REVERSED, because the court in its instructions to the jury defined the crimes of voluntary and involuntary manslaughter, when the evidence showed the defendant either to be innocent of any crime or to be guilty of murder.

CRIMINAL LAW. — INSTRUCTION CONCERNING REASONABLE DOUBT is not erroneous because it limits such doubt to a reasonable doubt arising out of the evidence in the case.

CRIMINAL LAW. — A REASONABLE DOUBT IS ONE ARISING FROM a candid and impartial investigation of all the evidence, such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause.

CRIMINAL LAW. — TO WARRANT CONVICTION ON CIRCUMSTANTIAL EVIDENCE, it is not essential that no inference or presumption should be indulged in by the jury that did not in their minds necessarily arise from the circumstances proved.

CRIMINAL LAW. — OMISSION OF THE COURT TO ASK DEFENDANT BEFORE JUDGMENT AND SENTENCE IF HE HAD ANYTHING TO SAY WHY sentence should not be pronounced against him will not warrant a reversal of such judgment.

CRIMINAL LAW. — PLEA OF FORMER JEOPARDY MUST SHOW how and when the prisoner was put in jeopardy.

CRIMINAL LAW — FORMER JEOPARDY. — If a new trial is granted on the defendant's application, he may again be tried on the same or on an amended indictment.

CRIMINAL LAW — AMENDED INDICTMENT. — After a defendant has been tried and convicted, and a new trial has been granted at his request, a grand jury may find a new or amended indictment charging him with commission of the same crime, and he may be tried and convicted thereon before the first indictment has been actually discontinued or disposed of.

INDICTMENT of Alfred Gannon for murder. He was convicted at the trial, and thereupon prosecuted a writ of error.

F. M. Guinn, and Henry and Fouke, for the plaintiff in error.

Hunt, attorney-general, and James M. Alberts, state's attorney, for the defendant in error.

MAGRUDER, J. Plaintiff in error was indicted for the murder, on April 5, 1886, of Hansbrough McCaslin, in the county of Fayette. The indictment contains two counts. The first count charges the prisoner with having strangled the deceased; the second count charges him with having cast, thrown, and pushed the deceased into a creek or pond of water, whereby he was choked, suffocated, and drowned. The trial took place in March, 1888, before the circuit court of Fayette County, and resulted in the finding of a verdict of guilty. The jury, by their verdict, fixed the punishment at imprisonment in the penitentiary for a period of twenty years. Judgment was rendered on the verdict, and plaintiff in error prosecutes his writ of error from this court.

It is assigned as error that the verdict is not sustained by the evidence, which is entirely circumstantial in its character.

The deceased, Hansbrough McCaslin, was a boy between

six and seven years old at the time of his death, and was the child of Ann Gannon, the wife of plaintiff in error. He was familiarly called Hank, and appears to have been an illegitimate child. On November 1, 1885, plaintiff in error, being then not over twenty-four years of age, married Ann McCaslin, the mother of this boy, who is said by the witnesses to have been between five and six years old at the time of the marriage. Some time in February, 1886, plaintiff in error, with his wife and her boy, took up his abode in a log-house containing one room, situated about two hundred yards east of Ramsey Creek, in Fayette County, and in a field of ten or twelve acres of cleared land.

On the morning of April 5, 1886, at half-past eight o'clock, plaintiff in error went with the boy from the house down to the creek for the ostensible purpose of fishing, leaving his wife alone at the house. He returned to the house on horseback, without the boy, at about twelve o'clock, making no inquiry as to whether his step-son had returned, and no remark as to his absence. There is no living witness, except himself, of what took place between him and the boy while he was gone. Upon his return, he found his wife's brother, Benjamin F. McCaslin, in the house. The latter had arrived on horseback about fifteen or twenty minutes before Gannon's return, had tied his horse to the fence outside of the yard, and was sitting in the room with his sister. Upon coming up, Gannon laughingly asked his wife if he could "get dinner and his horse fed." "She told him that she supposed he could." He and his brother-in-law at once went to the stable with their horses. When they came back into the house, his wife asked him where the fire-shovel was that he had taken away "in the morning with fire to set [on fire] some log-heaps that he was burning." He replied that he had left it at the creek, and "told the boy to bring it when he came up." He asked his wife, who was cooking the dinner, if he would have time, before dinner was ready, to go out and mend up some log-heaps. She told him that he could go if he did not stay too long. He then invited his brother-in-law to go with him to see his "corn-ground," and they walked out together. They passed two log-heaps. McCaslin, who appeared to be uneasy about the non-appearance of his nephew, looked down the creek to see if the boy came. He asked Gannon where he had left the boy, "and he said he left him down below there fishing, and I made the remark, 'he hangs on well for a little

fellow.'” Gannon then proposed that they go down and see what he was doing.

They crossed the fence at a point about fifty yards from the bank of the creek, went westward towards the bank, and then southward down the creek about one hundred yards. Gannon remarked, “that creek looks awful,—looks almost like a river.” They discovered the boy’s clothes on the ground. When they were twenty or thirty feet north of the clothes, Gannon said: “There is his clothes on the bank.” “He appeared to be somewhat embarrassed over it.” They passed about two feet east of the clothes, and southward down the creek thirty-nine feet, as was ascertained by a subsequent measurement. Here they found the lifeless body of the boy in the water.

A tree had fallen into the creek, whose roots projected above the surface of the water. The body, which was totally naked, had been caught in the roots, and was supported by them, so that it appeared near the surface, one shoulder being above the water. Gannon asked McCaslin if he could get the body out, but the latter declined to allow it to be touched, saying that a coroner’s inquest must be held. Upon being told this, Gannon shed tears, and remarked that it would kill his wife.

The boy’s clothes — pants, waist, shoes, stockings, cap — lay upon the east side of the creek, twelve and a half feet east of the edge of the water. There was an upper bank, with an abrupt descent therefrom to the sand below, before coming to the water. Two fish-hooks had been set. One fish-pole had been stuck into the bank at a point directly west of and opposite the clothes. Twenty feet south of this another fish-pole had been stuck into the bank. The shovel was sticking in the upper bank a little below the clothing. The ground was soft and muddy. The water of the creek was muddy, and the current was west of the place where the body was found, the water at that point being comparatively still.

McCaslin and Gannon went back to the house together. As they entered the door, Gannon fell back a little, while McCaslin told his sister that Hank was drowned. McCaslin says: “What he said was in response, I presume, to what his wife said. I came up on the door-step. . . . I told her that the child was drowned; she says ‘I knew it, I knew it; my heart has ached for two hours, O Alfred,’ and at that point he dodged in and caught her and told her to ‘hush, not take on.’” McCaslin left Gannon with his wife, and went after two neighbors, Fish

and Williams, who were mending a fence at the adjoining farm. Fish and Williams went to the creek, examined the situation and surroundings, took the body from the water, put some of the clothes upon it, carried it to the house, and placed it in the mother's lap. Other neighbors went to the place where the body was found, and made examinations and measurements before sundown. The house was not visible from the point where the clothes were found on account of the timber and brushwood which intervened. Some twenty or thirty steps away from the clothes, the roof of the house might be seen.

It is in proof that on a chilly, rainy day in the middle of February, the plaintiff in error drove the boy out of the house. This occurred in the morning about ten o'clock. Gannon and another brother-in-law, named Robert McCaslin, were at work, making boards about two hundred yards from the house, but in sight of the door. Gannon made two trips to the house. During one of his absences, the boy was with his uncle; he had on pants and a waist, was bare-headed, and his bare toes protruded from his shoes; he began to shake and shiver, and wanted to go to the house, but wanted his uncle to go with him; he, however, went alone; shortly afterwards he came back to his uncle crying, Gannon standing in the door-way and looking at him; his uncle carried him to Ramsey; he remained there several days, and then Gannon came after him and took him back. Gannon admits that on that morning he and his wife had had a quarrel about some other woman. While denying that he drove the boy out, he says that he told his wife she could leave, and take her son and her brother with her, and that the boy went out and down to the place where his uncle was. Several witnesses for the defense testify that they never witnessed any acts of unkindness on the part of plaintiff in error towards the boy.

Plaintiff in error says that he left the house with the boy on the morning of the latter's death at about half-past eight o'clock; that he stopped to fix two log-heaps; that he may have been at the first log-heap a half an hour or an hour, but cannot tell how long he was at the second; that they also stopped to get bait under or near the fence; that the boy was fishing with the north pole and he with the south pole; that he left his fishing-pole at about ten o'clock, and went west along the south side of the fence, mending the fence, pulling the bushes from a slough that passed under the fence, etc.;

that he caught his horse, which was in the inclosure with a halter on, and rode him up to the house; that when he left the fishing-place, the boy was holding the north pole, fishing with it. In view of the time spent at the log-heaps before ten o'clock, and at the south fence after ten o'clock, it is apparent that very little time could have been spent in fishing, according to the account given by the prisoner of his own movements.

The theory of the defense is, that after his step-father left him the boy took off his clothes, and went into the creek and was drowned. To support this theory, testimony was introduced to show that the boy was fond of going into the water. This testimony consisted mainly of the statements of persons who had seen him with his pants rolled up, wading in a ditch near the railroad track, and in a pond on somebody's premises.

In opposition to the theory of the defense, it was shown by the prosecution that on the morning of April 5th the weather was cold, there was ice in the sloughs, the snow was melting off, and the creek was swollen with the spring floods. Would a boy be likely to attempt to swim in the water under such circumstances? It was further proven by the state that there were tracks leading from the place where the clothes were found to the water's edge; that these were shoe-tracks, or the tracks of shod feet; that there were no barefoot tracks from the clothes to the water; that the ground was soft enough to show such tracks, if the boy had taken his clothes off and walked barefooted to the creek; that the heavy imprint of a man's boot or shoe heels was in the sand near the water's edge, and near them the imprint of a boy's hand and fingers, with lines extended therefrom in the sand for about two feet, as though the boy had been pushed into the water, or had struggled to get from the water and had been pushed back.

When the body was found, sediment an eighth of an inch thick had settled over it, except "the point of the shoulder, where it waved out of the water." This circumstance would go to show that the body had been in the water some considerable time. The place where plaintiff in error claims to have begun mending his fence after leaving the fishing-ground was only distant from the fish-poles sixty or seventy yards. He could have seen the deceased if the latter had gone to the house to take the shovel at any time between ten o'clock and twelve o'clock. He did not go back to the fishing-place on the bank

of the angry creek to discover why the boy staid there so long. The left side of the boy's neck was found to be purple, and there was a purple place six or seven inches long on the left thigh.

The medical witnesses, whose testimony is in the record, did not examine the body, and they base their opinions entirely upon descriptions of the body as given by others. It is difficult to determine from what they say whether the discoloration was the effect of wounds previously received, or not. It would seem to be true, however, that the discoloration which proceeds from the natural decay of the body does not disappear after it comes, and spreads more and covers a larger surface than does the discoloration that results from a bruise. Thomas H. Patton, who examined the body on the day it was found, and saw the purple spots on the thigh and left side of the neck and part of the jaw, says that these spots on the cheek or jaw had passed away and could not be detected on the day when the body was interred.

The prosecution also introduced testimony tending to show that on the afternoon of April 5th and on the next day the plaintiff in error kept close by the side of his wife, and prevented her from communicating with other persons. He did not allow her to be with others unless he was present. At night, when his wife and another woman lay across the bed, he lay between them, although there was another bed in the room. On the day of the coroner's inquest he followed his wife to the part of the yard where the women were gathered, and kept away from the place where the men had collected together.

The defense introduced evidence to show that the plaintiff in error was a peaceable, law-abiding citizen. The state, however, proved that he once had a difficulty with an old man named Strickland, and struck him; that he also had a difficulty with a man named Dickerson, and knocked him down, and was fined for the offense by the police magistrate; that he was indicted and tried for burglary, but was acquitted; that since his arrest on the charge of murdering his step-son he escaped from jail and fled to Missouri, where he was recaptured after being shot in the arm by the officers of the law, and that, while on his way from Missouri to Illinois in charge of the officers, he jumped from the train while it was traveling at the rate of twenty miles per hour, and was again recaptured.

We cannot further comment upon the testimony. It is circumstantial; but after a careful examination of it, we cannot say that the verdict is against the weight of it. The jury saw the witnesses and heard them testify. We find nothing to show that the jury was influenced by prejudice or passion. This is the second trial. Upon the first trial plaintiff in error was found guilty, and his punishment was fixed at fourteen years in the penitentiary. A new trial was granted him, and a second jury have found him guilty, and fixed his punishment at a longer period.

It is also assigned as error that proof was admitted of Mrs. Gannon's exclamation when she first learned that her son was dead. We think it was properly admitted, as explaining the prisoner's language at that time. The state had the right to show what his utterances were and what his conduct was at the time of the discovery of the body, and immediately thereafter. As soon as he came into the presence of his wife, he dodged into the house and caught her, and told her "to hush, not take on." These words were addressed to her in response to something she said to him, and cannot be fully understood without knowing what she said. The command to "hush" was a command to her to refrain from saying what she had begun to give utterance to. The meaning of the command, as showing what he desired to have concealed or unspoken, could only be explained when considered in connection with the words made use of by her. He told her not to "take on." This expression was meaningless, unless it could be determined how and in what way she was "taking on" by admitting proof of the words she addressed to her husband. While the law will not permit husband and wife to testify as to their confidential communications with each other, yet a third person hearing a conversation between husband and wife may give evidence of it: *Commonwealth v. Griffin*, 110 Mass. 181; Wharton's Crim. Ev., 8th ed., sec. 398.

The next error assigned is, that one of the counsel for the prosecution was permitted to make improper utterances in his address to the jury, and that certain instructions asked by the defense, which cautioned the jury against the influence of such utterances, were refused by the trial court. There is nothing in the bill of exceptions, or in the record anywhere, to show either what remarks were made by counsel, or that any objection was made to such remarks, or any exception taken thereto. Counsel for the defense have presented us with what they

claim to be a copy of the speech made on the trial by one of the attorneys for the prosecution. But we cannot consider it, because it is no part of the record. Instructions must be based upon the evidence, and instructions based upon supposed remarks of counsel about which the record is entirely silent, and to which the bill of exceptions makes no reference, are properly refused.

It is also objected that the court gave the jury two instructions defining voluntary and involuntary manslaughter. It is not claimed that the definitions are incorrect, but that the instructions were improper, because the crime, if crime there was, could be nothing but murder. We fail to perceive how the plaintiff in error was injured in any way by calling the attention of the jury to an offense less in degree than that with which he was charged. The instructions complained of were rather favorable to him than otherwise. They could not have had any injurious effect upon the minds of the jury, as they found plaintiff in error guilty of murder, and not of manslaughter.

The instruction given for the prosecution upon the subject of reasonable doubt is complained of. This instruction is substantially the same as instruction No. 12, commented upon in *Spies v. People*, 122 Ill. 251, 3 Am. St. Rep. 320, and is sustained by that case and the cases there referred to. The main objection urged against it is, that it tells the jury to give the prisoner "the benefit of any reasonable doubt arising out of the evidence in the case." This conforms to the definition of reasonable doubt already laid down by this court in *May v. People*, 60 Ill. 119, where we said: "A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause."

The defense asked an instruction which contained the following words: "And if it is possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, then it is your duty, as jurymen, to so account for it, and find the defendant not guilty." The court refused the instruction, and such refusal is claimed to be error. Wharton says the doctrine that, "to justify a conviction on circumstantial evidence, it is necessary to exclude every possible hypothesis of innocence," is based upon "a series of dicta": Wharton's *Crim. Ev.*, 8th ed., sec.

10; *Shultz v. State*, 13 Tex. 401. Wills says: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt": Wills on Circumstantial Evidence, 149. We do not deem it necessary to the decision of this case to discuss the question. Assuming the principle announced in the refused instruction to be correct, we cannot say that its refusal worked any injury to the defendant in this case, because it was substantially embodied in several other instructions which were given for him, and at his request.

In one of the instructions given for the defendant, the court said to the jury: "To warrant a conviction of the defendant, he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent, when all the evidence in the case is considered together." In another, the court said: "Before a jury will be justified in returning a verdict of guilty, the circumstances so relied upon to justify a conviction must be so strong, pertinent, and convincing as to exclude every reasonable doubt of his innocence." In still another, the court said: "The jury are instructed that when circumstances alone are relied upon by the prosecution for a conviction, the circumstances must be such . . . as are reconcilable with no other reasonable hypothesis than that of the defendant's guilt, and must satisfy the mind of the jury of the defendant's guilt beyond a reasonable doubt."

The court also refused to give for the defendant an instruction to the effect that, "while circumstantial evidence is legal and proper evidence in criminal cases, yet no inferences or presumptions should be indulged in by a jury that do not, in their minds, necessarily arise from the circumstances proved," etc. There was no error in the refusal. The vice of the instruction consists in the use of the word "necessarily." The inferences to be drawn by the jury from the circumstances proved must be such as to satisfy their minds of the guilt of the defendant beyond any reasonable doubt. The conclusion that the defendant is guilty beyond a reasonable doubt may not follow necessarily from the proven circumstances, but may be obtained therefrom by probable deduction. Greenleaf says: "Circumstantial evidence is of two kinds, namely, certain, or that from which the conclusion in question neces-

early follows, and uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning": 1 Greenl. Ev., 14th ed., sec. 13 a. The conclusion that death has resulted from murder, rather than from accidental drowning, may be reached by a process of reasoning, so as to leave in the mind no reasonable doubt as to its correctness.

Complaint is made that the defendant was not asked by the court, before judgment and sentence, if he had anything to say why sentence should not be pronounced against him. There is no statute requiring the court to so call upon the defendant. The record in this case contains the following: "Neither defendant nor his counsel having anything further to say why sentence should not be pronounced against him by the court on the verdict of guilty rendered by the jury in this cause, it is therefore ordered," etc. It would appear from this recitation that the defendant had a chance to speak, if he had desired to do so. We disposed of this question, so far as minor felonies are concerned, in *Bressler v. People*, 117 Ill. 422.

We are of the opinion that while it is a better practice to call upon the defendant to say why he should not be sentenced, yet the omission to do so is no ground for reversal in any case.

Such omission does not affect the verdict, because defendant is never called upon to speak until after verdict.

One of the reasons given for the origin of the practice in England is, that a person on trial for felony was not allowed counsel. Here the accused always has counsel to represent him.

Another reason assigned in the books for the observance of the practice is, that a motion may be made in arrest of judgment. Under our system, the motion in arrest and the motion for new trial are disposed of before the time for the sentence arrives. In the case at bar, defendant made motions for new trial and in arrest of judgment, and they were both overruled. It is necessary that the prisoner be present when the verdict is rendered, and that he be present when sentence is pronounced; and if the record shows, as the record in the present case does show, such presence of the prisoner, it is not perceived how his rights are prejudiced by a failure to observe the ceremony contended for. It has been said that the defendant is thereby enabled to lay before the court certain statements which may have the effect of mitigating his pun-

ishment. But under our statute, the extent of the punishment is fixed by the jury in their verdict, and not by the court at the time of sentence. In quite a number of the states, the failure of the record to show the observance of the ceremony has been held not to be ground for a reversal, though it is held that the form is one proper to be used: Wharton's *Crim. Pl. & Pr.*, 9th ed., sec. 906; *State v. Hoyt*, 47 Conn. 518; 36 Am. Rep. 89; *State v. Bell*, 27 Mo. 324; *Sarah v. State*, 28 Ga. 576.

Plaintiff in error also assigns as error that the trial court erred in refusing to admit the record of the former trial of this case to go to the jury as evidence of former jeopardy. The present record recites that defendant entered his special plea of former jeopardy, which was demurred to by the state, and the demurrer was sustained. But the plea itself is nowhere set forth in the record now before us, and we have no means of knowing what it was. Such a plea must show how and in what manner the prisoner was put in jeopardy: Wharton's *Crim. Pl. & Pr.*, 9th ed., sec. 520.

But independently of the question of the absence of the plea, the record of the former trial would have been no bar if it had been admitted. It showed that defendant was tried, convicted, and his punishment fixed by the verdict at fourteen years in the penitentiary; but it also showed that the verdict was set aside, and a new trial granted, upon his own motion. If a new trial be granted on the defendant's application, this is in itself no bar to a second trial on the same or an amended indictment: Wharton's *Crim. Pl. & Pr.*, 9th ed., sec. 435 a. In *State v. Blaisdell*, 59 N. H. 328, it was said: "The verdict was set aside, on motion of the respondent, for the misconduct of a juror. The trial was illegal, and went for nothing, and the second trial was not a second jeopardy."

After the new trial was granted, and at the February term, 1888, the case was submitted to another grand jury, who returned a new indictment, and the second trial took place under this new indictment. It is really an amended indictment, and is the same as the one under which the first trial took place, with the exception of some changes in the phraseology. Plaintiff in error complains that the court below erred in proceeding to trial under the second indictment before the first one was disposed of. No error was committed in the respect here indicated. In *Commonwealth v. Drew*, 3 Cush. 279, Chief Justice Shaw said: "Where it is found that there is

some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects in the first. And it is no good ground of abatement that the former has not been actually discontinued when the latter is returned."

The judgment of the circuit court is affirmed.

JEOPARDY, WHAT CONSTITUTES: See monographic note to *State v. McKee*, 21 Am. Dec. 505-508. An accused is not put twice in jeopardy by being remanded for a new trial after having had a former conviction set aside for error occurring in the trial: *Younger v. State*, 2 W. Va. 579; 98 Am. Dec. 791; *Butcliff v. State*, 18 Ohio, 469; 51 Am. Dec. 459. When a defendant procures a reversal of a former judgment of conviction upon appeal, though asking for a discharge on the grounds of insufficiency of the verdict, and not for a new trial, if the prayer for a discharge be denied, and a new trial granted, the defendant will be regarded as impliedly assenting to all the consequences legitimately following such reversal, and a plea of once in jeopardy by reason of the former trial cannot be sustained upon the new trial: *People v. Traversa*, 77 Cal. 176.

CRIMINAL LAW — REASONABLE DOUBT. — A reasonable doubt, as used in the law of evidence, is a conscious uncertainty in the mind of the jury, after a fair consideration of all the proofs in the case respecting the guilt of the accused: *State v. Ching Ling*, 16 Or. 419. An instruction to the jury that a reasonable doubt of a prisoner's guilt means a doubt "for which you can give a reason" is not good: *State v. Sauer*, 38 Minn. 433. There is no error in the following instruction: "If you are then not so satisfied and convinced of the defendant's guilt that you would act upon that conviction in matters of highest importance to yourselves, you should give the defendant the benefit of the doubt, and acquit; if you are so satisfied, you should convict him": *State v. Schaffer*, 74 Iowa, 704.

ORTHWEIN v. THOMAS.

[127 ILLINOIS, 354.]

A BASTARD COULD NOT INHERIT EVEN FROM ITS MOTHER by the common law, and this rule prevailed in the state of Illinois until, in the year 1829, a statute was enacted rendering illegitimates competent to inherit from their mother.

ESTOPPEL. — **THE RECITALS IN A DEED OPERATE BY WAY OF ESTOPPEL** upon the grantee, and after its record, upon his grantees.

EVERY CHILD IS PRESUMED TO HAVE BEEN BORN IN LAWFUL WEDLOCK; and this presumption must prevail until overcome by clear and convincing proof.

PRESUMPTION THAT A CHILD WAS BORN IN LAWFUL WEDLOCK, and is legitimate, is not overcome by mere rumor, nor by the absence of positive proof of the actual marriage of its parents, nor by evidence of the sons of a brother of the child's mother that they had heard their father say

that such mother had no husband, and that her child was illegitimate. And where the question was as to the legitimacy of Susannah, wife of Thomas O., and daughter of Hannah, it was held that a deed made after the death of Hannah by her parents, James and Fanny H., to Susannah and her husband, Thomas, reciting the death of Hannah, the wife of William R., and that the grantors were Hannah's parents, and were her heirs at law, and that for the purpose of vesting the said Susannah and her husband with all the lands of which said Hannah was possessed in her lifetime, the grantors granted to said Thomas and Susannah all the lands which descended to the grantors on the death of their said daughter Hannah R., did not remove the presumption of Susannah's legitimacy, though if she were legitimate, she, and not the grantors in said deed, was the heir at law of said Hannah.

A WIFE NOT A PARTY TO AN ACTION BROUGHT BY HER HUSBAND cannot be affected by any judgment or other relief he may obtain therein declaring him to be the owner of real estate which in fact belongs solely to her; nor can any deed obtained by him pursuant to such judgment amount to color of title.

REVERSIONERS AND STATUTE OF LIMITATIONS. — CHILDREN INHERITING FROM THEIR MOTHER real estate of which their father is tenant by the curtesy are not entitled to possession until after his death, and the statute of limitations cannot run against them in his lifetime.

LACHES. — Children inheriting real estate from their mother, subject to their father's rights as tenant by the curtesy, are not guilty of laches in remaining silent for more than thirty years, during which time their father was alive, and he and his grantees laid out and platted a town on such realty, and were in possession thereof; for such possession was lawful and consistent with the father's estate, and neither the children nor their grantees had any right to disturb it.

JUDGMENT AGAINST A TENANT cannot estop his landlord who was no party thereto.

A PRIVY TO A JUDGMENT OR DECREE IS ONE WHOSE SUCCESSION TO THE RIGHTS OF PROPERTY THEREBY AFFECTED OCCURRED after the institution of the particular suit, and from a party thereto.

M. Millard and William P. Launtz, for the village of Brooklyn.

Charles W. Thomas and O. H. Patton, for the other appellees.

SHOPE, J. This was a proceeding in equity to establish title, and for the partition of all that part of United States survey No. 764, in St. Clair County, lying between Water Street, in the village of Brooklyn, and the Mississippi River, being 1,995 feet long north and south, and about 2,000 feet wide, and which has been formed by accretion since 1837, when the village was platted. The complainants in the original bill claim to be the owners of the premises in question in fee, as tenants in common, under mesne conveyances from Thomas Osborn. The village of Brooklyn, one of the defendants,

claims the premises by virtue of a town plat made and recorded by Thomas Osborn and his immediate grantees in 1837, and as accretions to Water Street; and the appellant, also one of the defendants, claims an undivided thirty-three thirty-fifths interest in the same premises, under mesne conveyances from the heirs of Susannah Osborn. Answers were filed to the bill, and defendant Orthwein exhibited his cross-bill, which was also answered. Replications were filed and testimony taken under the original and cross-bills and answers, and upon the hearing both the original and cross-bills were dismissed. The defendant Orthwein alone perfected his appeal, and brings the record into this court, assigning for error the dismissal of his cross-bill.

Hannah Ratcliff, or Hannah Hillman, the same person, is the common source of title. Hannah Hillman was the daughter of James and Fanny Hillman. About 1808 she removed from Pennsylvania and settled in St. Clair County. She bought the militia claim of John Moredock, No. 610, for one hundred acres of land, which was located upon United States survey No. 764, which is the tract of land to which the land in controversy is an accretion, and upon which she settled about 1813, occupying it as a residence while she lived, and owned it in fee at the time of her death, in 1822. She died intestate, leaving surviving one child, Susannah, born in 1786, who, in 1807, intermarried with Thomas Osborn. Susannah and her husband moved upon this land of her mother's about 1816, and also occupied it as a residence from that time till the death of Susannah, in 1832. Susannah died intestate, leaving surviving, her husband, Thomas Osborn, and six children.

It appears that Hannah Hillman emigrated to this state with one William Ratcliff; that they here lived together upon this survey, as man and wife, until Hannah's death. There is no direct evidence of their marriage. The first serious question presented is as to the legitimacy of Susannah. She was the daughter of said Hannah, but the original bill charges that she was a bastard, and incapable of taking, by descent, the lands owned in fee by her mother at the death of the latter. When Hannah died, her father and mother, James and Fanny Hillman, were still living in Pennsylvania, and the theory of the bill is, that James and Fanny Hillman took by descent, as heirs of their daughter, Hannah, survey No. 764, and that Susannah took nothing.

At the time of Hannah's death, in 1822, the common law had not been modified by statute, and a bastard could not inherit, even from its mother. It is true that from the earliest organization of civil government in the territory northwest of the river Ohio, the descent of property had been regulated by written law. The rule of descent was first declared in the ordinance of 1787, and the act of March 23, 1819 (Laws 1819, sec. 21, p. 230), in force in 1822, was a literal transcript of the second section of the ordinance. And although the rule had, meantime, been thrice declared by legislative authority, viz., by the governor and judges of the territory northwest of the Ohio River in 1795 (Ter. Laws 1795, sec. 4, p. 92), by the legislature of the Indiana Territory in 1807 (Rev. Stats. Ind. Ter. 1807, p. 77), and by the governor and judges of the Illinois Territory in 1809 (1 Pope's Digest, sec. 22, p. 207), in every instance the persons first taking from the ancestor were described as "children." Susannah was the child of Hannah, and within the letter of the statute; but if illegitimate, she would nevertheless be excluded from the inheritance, for, under the rule of construction as applied to statutes, the word "child" or "children" embraces only legitimate children: *Blacklaws v. Milne*, 82 Ill. 505; 15 Am. Rep. 339. It was not until 1829 that the rule of the common law was so modified in this state as that illegitimates could inherit from their mother: Rev. Laws 1829, sec. 47, p. 207. And this has been the rule of descent from that time to the present.

If, then, the complainants have shown that Susannah was illegitimate, the estate of Hannah descended, "in equal parts, to the next of kin in equal degree," namely, to the father and mother, brothers and sisters (if any), and their descendants: Act of March 23, 1819.

For the purpose of showing illegitimacy, reliance is placed upon a deed from James and Fanny Hillman, executed and acknowledged by them in Alleghany County, Pennsylvania, February 19, 1825, to Thomas Osborn. This deed recites:—

"Whereas, Hannah Ratcliff, wife of William Ratcliff, of said state of Illinois, daughter and heir of the said James Hillman, departed this life in the month of October, 1822, leaving the said James Hillman, her father, and Fanny, his wife, her heirs at law: Now, for the purpose of vesting said Thomas Osborn, and Susannah, his wife, who is the daughter of said Hannah Ratcliff, with all the real estate, to wit, lands, tenements, hereditaments, which the said Hannah Ratcliff was

possessed at the time of her death, situate and being in the state of Illinois, aforesaid, and for the sum of one dollar to us in hand paid by the said Thomas Osborn, at and before the sealing and delivery hereof, the receipt of which is hereby acknowledged, have granted, bargained, and sold to the said Thomas Osborn, and Susannah, his wife, and their heirs and assigns forever, all lands, tenements, hereditaments, of whatever nature or kind, which descended to us at the death of our daughter, Hannah Ratcliff, late of the state of Illinois, deceased."

It is manifest that the recitals of fact in this deed operate by way of estoppel upon Thomas Osborn, and after its record in the proper county, August 9, 1827, upon his grantees. As was said in *Pinckard v. Milmine*, 76 Ill. 453: "We recognize the doctrine of estoppel by the recitals in a deed, and that a party claiming under such deed cannot be permitted to deny any fact admitted to exist by such recitals"; citing *Byrne v. Morehouse*, 22 Ill. 603, and *Rigg v. Cook*, 4 Gilm. 336, 46 Am. Dec. 462; and adding: "The principle of these cases is, that whatever rights legitimately arise on such admitted facts may at all times be asserted, whether it be to obtain or defend the possession of such rights." Thomas Osborn would not have been permitted, nor can the appellees, his remote grantees, now be heard to deny the facts recited in this deed, namely, that Hannah Hillman and William Ratcliff were man and wife, and that Susannah Osborn was the daughter of Hannah Ratcliff. Hannah Ratcliff was then a married woman, and Susannah Osborn was her only child. In contemplation of law, Susannah is presumed to have been born in lawful wedlock, and this presumption must prevail until the legal presumption of legitimacy, and which attaches to every child, is overcome by clear and convincing proof; and the burden of showing illegitimacy is, by the law, cast upon those who allege it.

The doctrine announced is fully sustained by the authorities. In *Strode v. Magowan's Heirs*, 2 Bush, 621, it is said: "The law presumes that every child in a Christian country is, *prima facie*, the offspring of a lawful, rather than a meretricious, union of the parents, and that, consequently, the mother, either by actual marriage, or by cohabitation and recognition, was the lawful wife of the father; and in the absence of any negative evidence, no supplemental proof of legal marriage will be necessary to legitimate the offspring. Mere rumor is

insufficient to bastardize issue, or require positive proof of actual marriage. If the presumption be false, repellant facts may generally be established; and if no such fact can be clearly proved, the presumption, from mere filiation, should stand." So in *Wilkinson v. Adam*, 1 Ves. & B. 422, it is said by Lord Eldon that the rule cannot be stated too broadly, that the description "child," "son," "issue," and every word of that species, must be taken, *prima facie*, to mean legitimate child, son, issue, and that to this extent all the cases go. So, too, in *Caujolle v. Ferrie*, 23 N. Y. 91: "It being shown and conceded that the respondent was the son of the deceased, . . . the presumption of law was, that he was her legitimate son, and those who assume the fact of illegitimacy have cast on them the *onus* of establishing it." And the cases cited by the court go to this extent: that the law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy, and in the absence of evidence to the contrary, a child, *eo nomine*, is therefore a legitimate child. Nor does the law require an acknowledged and conceded child to prove an act of marriage to maintain his legitimacy. The presumption and charity of the law are in his favor, and those who wish to bastardize him must make out the fact by clear and irrefragable proof. The presumption of law is not lightly to be repelled. It is not to be lightly broken in upon, or shaken by a mere balance of probabilities. The evidence for repelling it must be strong, satisfactory, and conclusive. And in another case cited (*Pier v. Pier*, 2 H. L. Cas. 381), it is said: "Presumptions of this sort in favor of marriage can only be negatived by disproving every reasonable possibility."

The witnesses all affirm that Susannah Osborn was the daughter of Hannah Ratcliff, and the recitals in the deed confirm this; but the deed goes further, and shows that the daughter of the grantors was the wife of William Ratcliff. The witnesses also show that William and Hannah Ratcliff emigrated to Illinois in 1808, and thereafter lived together as husband and wife until the death of Hannah; and it is also shown that in 1816, William Ratcliff, and Hannah, his wife, joined in the execution and acknowledgment of a deed conveying land. It is also shown that Susannah was married to Thomas Osborn in 1807, at the age of twenty-one years; and although there is no evidence as to when William Ratcliff became the husband of Hannah Hillman, the testimony of the two sons of Benjamin Hillman (a brother of Hannah),

that they had heard their father say, when speaking of their aunt, whom the witnesses never saw, on occasions which they could not fix with any distinctness, and in conversations which they could not recall with any clearness, that Hannah had no husband, and that her daughter was illegitimate, does not rise to the dignity of that general repute in the family which the law regards as competent evidence in respect to pedigree, and is insufficient to repel the presumption of marriage. It is not general repute at all; it is the specific, hearsay statement of a single member of a numerous family, and, as such, is altogether too unsatisfactory and inconclusive to overcome the legal presumption of timely marriage between Hannah Hillman and William Ratcliff, and the legitimacy of their child, Susannah. And the testimony of these two nephews of Hannah Ratcliff, speaking, at most, only as to the repute in the family of their father, is all there is in this record to cast the slightest suspicion upon Susannah's legitimacy.

What is here said is not at all affected by the statement in the deed of James and Fanny Hillman (father and mother of Hannah Hillman), that upon the death of Hannah Ratcliff, she left "the said James Hillman, her father, and Fanny, his wife, her heirs at law." Whether they were or were not the heirs at law of their deceased daughter, would depend, not upon their naked assertion of heirship, but upon the existence of certain facts. It is impossible that they could have been the heirs at law of their deceased daughter, if such daughter left surviving legitimate offspring, or descendants thereof; so that, to make their statement of heirship in the deed true, they should have gone further, and bastardized the issue of their daughter, or been in a condition to do so by that character of proof required by the law. So far from doing this, they, by their recitals of fact in the same deed, as we have seen, support the legal presumption of legitimacy.

In any view we have been able to take of the facts disclosed by this record, the conclusion has been forced upon us, and we so hold, that Susannah Osborn was the legitimate daughter of William and Hannah Ratcliff, and took by descent, on the death of her mother, survey No. 764, of which her mother died seised in fee. This being so, upon the death of Susannah Osborn, in 1832, intestate, leaving surviving a husband, and six children born of the marriage, the estate descended to and vested in her children, subject, as the law

then stood, to the estate of Thomas Osborn, her surviving husband, as tenant by the curtesy. As such tenant, Thomas Osborn was entitled to the possession, use, and enjoyment of survey No. 764 for the term of his life, and which was not determined until his death, June 16, 1863.

Appellant claims to be the owner in fee of thirty-three thirty-fifths of the premises in controversy, by a chain of conveyances from the children and descendants of the children of Susannah Osborn. That the conveyances relied upon had the effect of vesting in appellant the fractional interest, if any they had, of such of the heirs of Susannah Osborn as conveyed to him or his grantors in the premises in controversy, is not denied; but it is insisted, on behalf of the village of Brooklyn, that appellant is not entitled to the relief prayed for in his cross-bill, because,—1. Thomas Osborn was the owner in fee of survey No. 764; and 2. If Thomas Osborn was not such owner, any claim based upon the title of Susannah Osborn is barred by lapse of time and by estoppel.

In support of the first position, reliance is placed upon the deed of February 19, 1825, from James and Fanny Hillman to Thomas Osborn, and Susannah, his wife. This deed was inoperative as a conveyance of title acquired by the grantors by descent from their daughter, Hannah Ratcliff, for the reason, as we have seen, the grantors took nothing by descent. It is next contended that Thomas Osborn acquired title by virtue of a decree of the circuit court of St. Clair County, and of a commissioner's deed executed in conformity thereto. That was a proceeding in equity instituted by Thomas Osborn against Jacob Trout and James Ward. The verified bill was exhibited in August, 1827. Complainant alleged therein that by deed of bargain and sale of February 19, 1825, he purchased of James and Fanny Hillman all the lands in Illinois which they, as father and mother of Hannah Ratcliff, inherited from her; that Hannah Ratcliff died seised in fee of survey No. 764, but without any lineal legal heir at law, whereby these lands descended in fee to her father, James Hillman. By proper averments the militia claim of Moredock, its location on survey No. 764, and its confirmation to Jacob Trout, were set out, followed by the allegations that in consideration of one hundred dollars paid to him by James Ward for the use of Hannah Ratcliff, Trout conveyed, by deed of bargain and sale, the same premises to James Ward, for the use of Hannah Ratcliff, and that afterwards, by a like deed, Ward

conveyed the premises to Hannah Ratcliff, "for whom the militia claim was purchased by the said Ward, with her money." The loss or destruction of these deeds, and that they had never been recorded, was alleged; also that the deed from Ward to Hannah Ratcliff could only be established by William Ratcliff, who had departed the state, and whose residence was unknown, but referred to and exhibited an affidavit of said Ratcliff showing its execution; that Trout knew Ward had bought the land with the money of Hannah Ratcliff, but refused to make a deed therefor directly to complainant; that Ward had departed this state, and his whereabouts was unknown, and praying a decree that Trout and Ward make to complainant a conveyance that should vest in him the fee, or that it be made by a commissioner, and which should bind Trout and Ward, and their heirs, etc. Trout answered, admitting the conveyance by him to Ward; that he was ready and willing to make another deed, and brought in and tendered a deed for the premises, running to Ward, and admitting that Ward purchased of him for the use of Hannah Ratcliff. By leave of court, the deed tendered by Trout was withdrawn, and placed on record. The cause was continued for publication against Ward, and at the next term (March, 1828), the bill was taken as confessed against Ward, and a decree passed based on the deposition of one McRoberts and the affidavit of William Ratcliff, directing the execution of a deed to complainant of survey No. 764, vesting in him all the right and title of Trout and Ward, and which deed should be a bar against Ward, "and all claiming under him." A commissioner was named, who, on March 28, 1828, conveyed the premises to Thomas Osborn in conformity with the decree.

It is hard to understand how an intelligent court could have been induced to render the decree mentioned, upon the facts disclosed. The first material allegation in the bill was untrue. Had the deed of February 19, 1825, from James and Fanny Hillman been exhibited (which was not done), or brought to the knowledge of the court (which manifestly was not done), it would have shown upon its face that the conveyance was to "Thomas Osborn and Susannah, his wife, and their heirs and assigns forever." Being husband and wife, Thomas and Susannah were, under this deed, and upon the theory that it was operative as a conveyance, tenants by the entirety, and either was incapable of claiming or holding adversely to the other.

This was elementary law, familiar to the distinguished justice who presided at the trial, and to the eminent counsel for the complainant; and it is clear that Susannah Osborn had no notice of this proceeding, or in any way consented thereto. The conveyances from Trout to Ward, and from Ward to Hannah Ratcliff, being lost or destroyed, and never having been recorded, it was proper practice to invoke the aid of a court of equity for the purpose of obtaining renewal deeds. In such application, Susannah Osborn was a necessary party, and no court, with knowledge of her joint interest in the premises, would have retained jurisdiction of the bill unless she was joined as complainant or defendant. Not being a party to this proceeding, and being, as the evidence shows, in the actual possession of the premises, Susannah Osborn's rights, even as the co-tenant of her husband, were not, and could not be, affected by any decree the court did or might render; and her husband, when he took the deed under this decree, took it both with actual and constructive notice of her rights in the premises, not only as his pretended co-tenant, but of her rights as owner of the fee, as heir at law of Hannah Ratcliff. As against Trout and Ward, and as a judicial determination of the fact that Hannah Ratcliff acquired the fee to these premises by a chain of conveyances from the United States, the decree may be binding and conclusive; but as against Susannah Osborn and her heirs, and those claiming through and under them, it is without force or effect. Nor can the deed to Thomas Osborn, acquired under this decree, amount to color of title, because not acquired in good faith. As Thomas Osborn acquired no interest in survey No. 764, under and by virtue of the deed of February 19, 1825, as before shown, neither did he acquire any interest or estate therein by virtue of this judicial proceeding, or of the deed made in conformity thereto. That deed only purported to convey to him the interest in that survey acquired by Ward from Trout. At the time the bill was filed, decree rendered, and deed made, Ward had no interest in the premises. All the interest and estate he ever had had long before been by him conveyed to Hannah Ratcliff, and vested in her in her lifetime, and on her death passed to her only heir at law, Susannah Osborn.

As to the second contention of the village of Brooklyn, — namely, laches and estoppel, — it must be observed, as Susannah Osborn died intestate in 1832, seised in fee of survey No. 764, leaving surviving her husband, Thomas Osborn, and six

children born of their marriage, such children took the estate by inheritance, encumbered, however, by a life estate in Thomas Osborn, their father, as tenant by the curtesy. The right of possession was in Thomas Osborn as long as he might live; and it was not until his death, June 16, 1863, that a right of action or of entry accrued to the fee-owners. Until the death of the life tenant, no statute of limitations began to run against the heirs of Susannah Osborn or their grantees; and laches can only be imputed to them from the time their right of entry accrued. We cannot say that appellant, and those through whom he claims, were guilty of laches after the death of Thomas Osborn. At his death the particular premises in controversy were not in the actual possession of any one. They had been formed by accretions by the Mississippi River since 1837. Along the east side lay Water Street of the old town of Brooklyn, — a street that the evidence shows had never been used and occupied as a street, either by the old town of Brooklyn, or by the more modern village. The land lay low, and was subject to overflow. But in 1873, Louise J. Purdy, who, by conveyances from the heirs of Susannah Osborn, had acquired a large fractional interest in these premises, under the claim of ownership, took possession of these premises in the most open and hostile manner. She built a fence along the north, east, and south sides, and erected a house thereon, which was occupied by her tenant. True, the water, years afterwards, washed away her house and fences; but she continued to exercise acts of ownership over the premises, paying the taxes thereon until in 1882, when she sold and conveyed to appellant, and thereafter, and until the commencement of this suit, appellant claimed the ownership to the extent of thirty-three thirty-fifths, and possession thereof. Being in possession, appellant might safely lie by until his possession was invaded or his title attacked.

The whole force of the argument of the village in support of the defense of laches is spent in pressing on our attention the fact that during all the years intervening between the death of Susannah Osborn and the filing of appellant's cross-bill, her heirs, and those claiming through them, remained silent. From her death, in 1832, down to the death of her husband, in June, 1863, — thirty years and eight months, — this is certainly true. During all that time, however, they could neither speak nor act. The right of possession was in their father and his grantees, and their right of entry had not

accrued, and it was only upon the determination of the intermediate life estate that they were required to speak or act, — nor then, as we have seen, until their rights were attacked or invaded. No word spoken or act performed by Thomas Osborn, or those claiming under him, during the existence of his life estate, could in the least affect the rights of those entitled to the possession upon the termination of his estate. True, Osborn and his immediate grantees, in 1837, and following the forms of the law, laid out and platted a town upon survey No. 764; but it was impossible that he should grant or convey thereby any greater interest in the land than he possessed. The possession of the streets and alleys of the town by the corporation, during Osborn's life, was in no sense adverse or hostile to those entitled to the possession of the lands on the termination of the life estate. And this is so, for the obvious reason that, pending the right of entry and of possession of the fee-owners, the possession of the life tenant and his grantees was lawful, and could, by no legal possibility, become hostile or adverse until the life estate was determined. It is not contended, as we understand, that the village of Brooklyn, after the death of Osborn, had actual possession of the premises in controversy. Indeed, it clearly appears that when Ludwig made his survey, in 1874, at the request of persons acting as village authorities, and made the new plat, he did so according to the old plat, extending it no farther westward than to embrace and show Water Street, eighty feet wide, and that at that time Ludwig found the lands lying to the westward (the controverted lands) under fence, and an occupied dwelling-house thereon. That this was the fence and house erected by Mrs. Purdy, and before spoken of, is unquestioned.

This litigation relates only to the tract of land formed by accretion since the laying out of the village of Brooklyn, and lying west of Water Street therein, which street was the western boundary of the village as platted. Hence the argument of counsel, predicated upon the supposed effect of the holding in this case upon the land included in the village, cannot be here considered. It may however be said, without impropriety, that it must be apparent, if, as counsel contend, the streets and alleys of the village and the lots therein have been in the adverse possession of the village and lot-owners since the death of Osborn, in 1863, that the principles and rules applied to the present case might not be held applicable

when the question as to the title to such streets, alleys, and lots arises, if it ever should arise.

But it is also contended that appellant is estopped by the decision in the case of *Village of Brooklyn v. Smith*, 104 Ill. 429, wherein it is held, upon the record then before the court, that the lands in controversy belonged to the village of Brooklyn, and formed a part of Water Street. In that case Smith, a tenant in possession under Mrs. Purdy, sought injunction against the village, to restrain its officers, and licensee, Voise, from interfering with Smith's use of the premises for the purpose of cutting and storing ice thereon. The only parties to the proceeding were Smith, in his character of tenant, the village, and Voise. As against Smith, and all claiming through and under him, the decree in that case is final and conclusive. But upon what principle can it be said that Mrs. Purdy, and appellant, claiming through and under her, are bound and concluded by a decree in a cause in which she was not a party? It is only parties, and their privies in blood or estate, that are estopped by a decree or judgment: *Morris v. Hogle*, 37 Ill. 150; 87 Am. Dec. 243; *Huls v. Buntin*, 47 Ill. 396. Parties to a decree, in the eye of the law, are those only who are named as such in the record, and are properly served with process, or enter their appearance: *Borders v. Murphy*, 78 Ill. 31; while a privy in blood or estate is one who derives his title to the property in question by descent or purchase; and a privy to a judgment or decree is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit, and from a party thereto: *Freeman on Judgments*, 3d ed., sec. 162.

It is very clear, when the Smith case was before the court, and from the facts as therein disclosed, that there was no adjudication in respect of the rights of the heirs of Susannah Osborn. The language used excludes any such idea. It was there said: "It appears, from the evidence, that Water Street was ever regarded by the inhabitants of the village as extending to the river, and so used, with no pretense ever made of any private claim to the contrary, until in 1873, when Mrs. Purdy went upon the river front and fenced a portion of it, claiming title, as her husband says, under deeds from the heirs of Osborn. No deeds were shown in evidence. But supposing there had been shown deeds from Osborn's heirs, they would have conveyed but Osborn's interest, which, at

most, could have been only a one-fifth interest, as one of the five original proprietors. But Osborn left no interest to descend and be conveyed. The acknowledgment by him, and recording of the original plat, had all the force of an express grant to convey from him the land embraced by Water Street, and vest it in the corporation of the village. The corporation was the owner in fee of the village." All this is predicated upon the assumption, fully justified by the record then before the court, that Thomas Osborn, and through him, Collins, Morris, Tabor, and Austin, were the owners of the fee when they platted the original town of Brooklyn. The premise admitted, the conclusion drawn is logical, that Thomas Osborn "left no interest to descend and be conveyed." That was true then, and is true now. But it does not follow that because the children of Thomas and Susannah Osborn took, by descent from their father, no interest in these premises, the same children did not inherit these premises from their mother. They did take, by descent, survey No. 764, of which their mother died seised, the fee vesting in them at her death; and upon the death of Thomas Osborn, the right of entry and possession accrued to the children of Susannah Osborn or their grantees. Mrs. Purdy is shown to have been such grantee of a large interest in the particular premises,—accretions formed upon premises owned in fee by her grantors,—which interest she appears to have acquired prior to the suit referred to, and in which suit neither she nor her privies in estate were parties. Appellant, claiming through her, is not therefore estopped by former adjudication.

The decree of the circuit court rendered herein is in all things affirmed, except in so far as it dismissed the cross-bill of appellant, Orthwein, and rendered judgment against him for costs, as to which said decree is reversed, and the cause remanded to the circuit court, with directions to find and declare the share or interest of appellant in and to said land, under conveyances from or through the heirs of Susannah Osborn, and decree the same to him in fee, and make partition of the same accordingly, and for that purpose, to permit amendments to said cross-bill or other pleadings, and to cause to be brought into court all such persons as may be deemed necessary, if any are necessary, to the proper rendition of such decree.

Decree reversed in part and in part affirmed.

LEGITIMACY. — A child is always presumed to be legitimate: *Commonwealth v. Shepard*, 6 Binn. 283; 6 Am. Dec. 449; *Cross v. Cross*, 3 Paige, 139; 3 Am. Dec. 778; *Wright v. Hicks*, 12 Ga. 155; 56 Am. Dec. 451; *Gurwin v. Gurwin*, 11 Ired. 174; 53 Am. Dec. 406; *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687; *Eloß v. Mader*, 1 Rob. (La.) 581; 38 Am. Dec. 192; *Dennison v. Pope*, 29 Pa. St. 420; 72 Am. Dec. 644; *State v. McDowell*, 101 N. C. 734; *as on this presumption be overcome by mere rumor: Vongak v. Rhodes*, 2 McOrd, 227; 13 Am. Dec. 712.

BASTARDS COULD NOT INHERIT AT COMMON LAW: *Sneed v. Boring*, 5 J. J. Marsh. 460; 22 Am. Dec. 41; *Smith v. Kelly's Heirs*, 22 Miss. 187; 55 Am. Dec. 87; *Norman v. Heist*, 5 Watts & S. 171; 40 Am. Dec. 493; *Jackson v. Johnson*, 78 Ky. 390; 39 Am. Rep. 246. But Maryland statutes allow illegitimate children to inherit from the mother and from each other in the same manner as if born in lawful wedlock: *Holms v. Francis*, 2 Bland, 544; 20 Am. Dec. 402; and in Connecticut a bastard may inherit in the same manner as though he was a legitimate child: *Dickinson's Appeal*, 42 Conn. 491; 19 Am. Rep. 552.

BASTARDY. — For a general discussion of the law as applicable to the rights of bastards, see extended note to *Simmons v. Bull*, 56 Am. Dec. 256 et seq.

ESTOPPEL BY DEED. — A party admitting a fact in his deed is estopped not only from disputing the deed, but every fact which it recites, and so all persons claiming under and through him: *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99.

PRIVIES — WHAT CONSTITUTE. — Privies are those who are partakers, or have an interest in any action or thing, or any relation to another: *Marr v. Hanna*, 7 J. J. Marsh. 643; 23 Am. Dec. 440; note to *Howard v. Kennedy*, 39 Id. 311-314.

HEIRTS BY CURTESY. — During the existence of this estate, lands do not descend to the heirs so as to give them a right of entry: *Jackson v. Johnson*, 5 Cow. 74; 15 Am. Dec. 433.

REVERSIONER AND STATUTE OF LIMITATIONS. — "The right of entry in the person in remainder can, in no case, be affected by the statute of limitations during the existence of the particular estate; and the laches of a tenant for life will not, as a general rule, affect the party entitled": Angell on Limitations, sec. 371. "If a husband seized as tenant by the curtesy makes a conveyance in fee, and the grantee enters and continues in possession, claiming to own the whole absolutely, such possession will be regarded as adverse to the wife and those claiming under her only from the period of the husband's death": Id.; *Constantine v. Van Winkle*, 6 Hill, 177; *Jackson v. Jackson*, 5 Cow. 95; *Bruce v. Wood*, 1 Met. 542; 35 Am. Dec. 380; *Wallingford v. Heath*, 15 Mass. 471; *Heath v. White*, 5 Conn. 223; *Jackson v. Johnson*, 5 Cow. 74; 15 Am. Dec. 433.

FIRST NATIONAL BANK OF ELGIN v. SCHWEEN.

[127 ILLINOIS, 572.]

CONTRACT, WHETHER FOR SALE OR BAILEMENT. — Contract between certain farmers and dairymen and one K., that they should furnish him milk, and that he should manufacture it into butter and cheese, sell the products, and after deducting four cents per pound for the butter and two cents per pound for the cheese, should divide the balance among them in proportion to the amount of milk furnished by each, constitutes him their factor merely, and does not vest in him the ownership of the cheese and butter manufactured.

A FACTOR MAY, BY CONTRACT, GUARANTEE the collection of the price of goods to be sold, and also that their sale shall realize certain sums.

DEED OF TRUST. — **BENEFICIARIES IN A DEED OF TRUST** need not be designated by name. Hence a deed of trust to secure such farmers and dairymen as should furnish the grantor with milk to be manufactured into butter and cheese is not void for want of designated beneficiaries.

CONFUSION OF GOODS. — If one unlawfully mixes and confuses his goods with those of another so that they cannot be distinguished, the innocent party becomes entitled to the whole. Hence if one who has contracted with others to manufacture into butter and cheese milk furnished by them mixes with the product of such milk butter and cheese purchased from others by him, he or his successor in interest has no title to any of the resulting mixture, unless he can identify that part which was his.

John Woodbridge, for the appellant.

Sherwood and Jones, for the appellee.

By COURT. The first and principal question presented by this record is, whether Kilbourne was the owner of the butter and cheese which he delivered to Bosworth on the night of October 14, 1883, in part payment of his indebtedness to the bank. If he was, then the bank is entitled to have its proceeds applied upon the indebtedness of Kilbourne to the bank. It is contended by appellees, who were complainants in the original bill, that the butter and cheese belonged to them, and was in the hands of Kilbourne as their factor and agent, under an agreement to make and sell the same for their benefit and use. The solution of this question depends upon the contract of Kilbourne with the patrons of his factory under which they furnished milk, the contention being, on the one side, that the milk was sold outright by complainants and others to Kilbourne, and on the other, that the milk was delivered to him to be manufactured and sold by him for and on account of the owners of the milk.

Prior to Kilbourne's purchase of the cheese factory at Barrington, in April, 1881, it had been operated by one McAdam, on what is known as the dividend plan, by which he received

milk from the neighboring farmers and dairymen, and manufactured it into butter and cheese for them at a certain price per pound, sold the product, and after deducting his commission for making and selling, he divided the balance of the proceeds among the patrons in proportion to the quantity of milk each had furnished. Soon after his purchase, Kilbourne had a conference with the farmers and dairymen, and agreed with them to take and manufacture into butter and cheese their product of milk, he to receive four cents a pound for the butter manufactured and two cents a pound for cheese made therefrom, he to sell the product and pay them the proceeds of the sale, less his compensation, in proportion to the amount of milk furnished by each, and gave personal security for the faithful performance of his agreement for one year. At the end of the first year, on April 4, 1882, Kilbourne, together with his wife, made their certain deed of trust to Alfred Bosworth, which deed contains the following recitals and provisions:—

“Whereas, said Kilbourne, grantor, is engaged in a certain cheese factory, located on said premises, in the manufacture of cheese and butter from milk furnished by sundry persons or patrons, which said cheese and butter the said Kilbourne sells from time to time, paying said patrons the proceeds of such sales as dividends, or as indebtedness for milk delivered to him; and whereas, said Kilbourne will become indebted, from time to time, to said patrons for the milk so delivered or to be delivered, and the proceeds arising from the sale of the product thereof: Now, if default be made in the payment to the patrons by Kilbourne for the milk to be delivered to him, or the proceeds arising from the sale of the product thereof, as aforesaid, for the space of sixty days from the last day of any month in which such milk shall be delivered, payment for all milk delivered by said patrons to said Kilbourne up to the date of such default shall become immediately due. . . . The dividends arising from the proceeds of the sales of the product of the milk; as aforesaid, shall be considered due and payable to the said patrons at the expiration of eighty days from the beginning of any month in which the said milk shall be so delivered.”

The witnesses, George W. and W. G. Waterman, Prouty, Kingsley, and Clark were present at Kilbourne's first meeting with the patrons of the factory, and testified that he solicited the farmers to furnish milk to be made into butter and cheese on the dividend plan, and agreed with them to charge two

cents per pound for making cheese and four cents per pound for making butter and selling the same, and that he would render honest dividends, which should be equal to, if not more than, the average dividends of surrounding factories. He refused to buy milk of a number of persons who testify, giving as a reason therefor that if he bought of one he would have to buy of all. There is, in our opinion, no doubt, from the evidence, that Kilbourne promised his patrons that he would give them as good dividends, and that the same should average with those given by other factories. It is true, some of the witnesses, speaking of this, say that he agreed they should be paid for their milk as much as was paid by other factories. This, however, is not necessarily inconsistent with the idea of paying for the milk in dividends.

The allowance of two cents a pound for cheese and four cents for butter made, for the manufacture and sale by Kilbourne, is inconsistent with the idea of an absolute purchase of the milk by him. If he bought the milk, for cash in hand or on credit, the product was his own, and there could have been no good reason why the vendors of the milk should have allowed him a commission for making and selling the same. It is shown, in accordance with the theory that Kilbourne was the agent of the complainants to manufacture and sell butter and cheese for them, that the patrons called him to an account for buttermilk he had sold, and forbid sales in the future.

If there was any doubt of the fact of the agency of said Kilbourne in the matter, the recitals in the deed of trust before mentioned ought to remove it,—that Kilbourne was “engaged in the manufacture of cheese and butter from milk furnished by sundry persons or patrons, which said cheese and butter he sells from time to time, paying said patrons the proceeds of such sale as dividends, or as indebtedness for milk delivered to him.” And again, “The dividends arising from the proceeds of the sales of the products of the milk as aforesaid shall be considered due and payable,” etc., would seem to clearly indicate that he was simply the factor of the farmers and dairymen, who accepted his proposition to furnish milk upon that plan. It is true the deed of trust has a provision looking to the security of any one who might sell milk to Kilbourne, and it appears that such provision was inserted to protect a party who sold his milk outright to him, and it would seem that the fact that such a provision was inserted for the purpose would preclude the idea that the others made

sale of their milk, for he appears to have been the only person shown to have made an absolute sale. The master in chancery, the superior and appellate courts, have found that the milk was furnished by complainants to Kilbourne to be made and sold on their account; as their agent or factor, and with this conclusion we agree.

It appears that before Kilbourne bought the factory, the farmers and patrons of this factory managed and run the business through officers or agents of their own selection. Kilbourne, claiming to have large experience in the business, and to have worked up a good trade for butter and cheese, represented to such patrons that he could make better sales than any agent they could appoint, and in the arrangement finally consummated they gave him full power, not only to manufacture, but to sell the entire product of the milk furnished by them.

Kilbourne claimed to be, and undoubtedly was, an expert in the production of butter and cheese, and his relation to the milk-owners brought him directly within the definition of a factor: Wharton on Agency, 735. The fact that he was to prepare the product for market did not render him any the less a factor. The principal may, by contract, require the agent or factor to guarantee the collection of the price of all goods sold, and the factor may guarantee that the property of his principal shall realize a certain sum.

The case of *Loneragan v. Stewart*, 55 Ill. 48, is relied on as showing that there was, under the circumstances here shown, an absolute sale of the milk. In that case it is said: "That when the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed,—it is a sale."

If the power of sale conferred had not been given, there can be no doubt that the owners of the milk would have owned its product. In such case, the identical thing, though in an altered form, would be required to be delivered, and would be the property of the owners of the milk. As soon as the milk was converted into butter and cheese, Kilbourne's power to sell as a factor attached, and he took the same as the agent of the milk-owner, holding the title for them until a sale was

effected. This may be more clearly apparent by supposing a revocation of his authority to sell. Can there be any doubt as to the legal ownership of the butter and cheese in such case? It is true, the manufacturer might have held it until his charges for its manufacture were paid; but subject to his lien for his commission, it would have belonged to the party who employed him to manufacture it.

It is claimed that Church and G. W. Waterman, by taking out attachments against Kilbourne, are estopped from denying that they sold him their milk. At the time of the institution of these suits, Kilbourne was indebted to these parties for money he had received for the sale of their butter and cheese in his hands as their agent; besides this, the affidavits for attachment do not state an indebtedness for milk sold. In the Lonergan case, *supra*, the affidavit alleged that the indebtedness was for corn sold. The attachment suits before referred to cannot be held as concluding the plaintiffs therein.

Kilbourne, having failed in business, and being largely indebted to the First National Bank of Elgin, on the night of October 14, 1883, transferred and assigned to the bank all the butter and cheese then on hand and in the process of manufacture, as a further security and pledge for the payment of his debt to the bank. The law is well settled that a factor cannot pledge the goods of his principal for his own debt, and it follows that the bank, by taking such pledge or security, acquired no title as against the real owner.

The second point made in the case is, that the deed of trust of April 4, 1882, is void for indefiniteness as to the beneficiaries, and is therefore not a lien on the premises therein described. For some reason, the farmers and dairymen in the neighborhood of this factory desired some sort of security that they would be paid the dividend in accordance with the agreement of Kilbourne on the milk they might furnish, and to secure their custom and patronage, the deed of trust before mentioned was executed. The beneficiaries of the trust were those who should thereafter furnish the factory with milk to be manufactured by Kilbourne under the agreement before referred to. This trust deed stood as a continuing offer by Kilbourne to all persons who might patronize him. Any person in the neighborhood, after the making and recording of such deed, might rely on the same, and receive the benefit thereof by becoming a patron of the factory. When we look at the inducement and purpose of the making of the deed of

trust, its object being to draw and secure the custom and patronage of any and all who had milk to dispose of, and were willing to accede to the terms proposed by Kilbourne, it is apparent that the intention of its maker was not to limit the deed as a security of those present when it was drawn and executed. It is not essential to the validity of a deed of trust that the beneficiaries should appear therein by name. It will be sufficient if they are so described or designated that they may be ascertained and distinguished.

It is also urged that the milk of complainants cannot be traced into the butter and cheese transferred to the bank, and in support of this objection it is said that Kilbourne had butter and cheese at his factory in Dundee, and also bought on the market, and mixed the same with the product of his factory, and sold all by the same brand, so that there was no means of identifying the product of the milk of complainants. If that be so, and the property of complainants had been mixed with other property of like kind without their consent, they should not be the losers thereby. The rule is, that if a party unlawfully mixes and confuses his goods with those of another so that they cannot be distinguished, the innocent party will be entitled to take the whole. The burden is upon the party thus confusing his goods with another to identify his own property, or lose it: *Diversey v. Johnson*, 93 Ill. 547; *Fuller v. Paige*, 26 Id. 358; 79 Am. Dec. 379; *Beach v. Schmultz*, 20 Ill. 185. Kilbourne could convey to the bank no better title than he possessed.

Finding no error in this record, the judgment of the appellate court is affirmed.

CONFUSION OF GOODS. — If an agent confound his own property with that of his principal, it is at his own risk: *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235. Where articles of the same kind and value are mingled together by the consent of the parties, each party is entitled to have divided to him as much as he may have put in, and is recognized in law as having a property in so much as he may have put into the common stock: *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430, and note 435, as to the effect of confusion of goods upon one's title thereto.

BAILEMENT OR SALE. — Whether a contract constitutes a bailment or a sale, see *Irons v. Kentner*, 51 Iowa, 88; 33 Am. Dec. 119; *Pribble v. Kent*, 10 Ind. 325; 71 Am. Dec. 327, and note; *Dunlap v. Gleason*, 16 Mich. 158; 93 Am. Dec. 231; *Carlisle v. Wallace*, 12 Ind. 252; 74 Am. Dec. 207; *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430, and note; *Smith v. Clark*, 21 Wend. 83; 34 Am. Dec. 213, and note; *Bryant v. Crosby*, 36 Me. 582; 58 Am. Dec. 767.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

WILSON v. STATE.

[17 TEXAS APPEALS, 47.]

CRIMINAL LAW — PERJURY. — In order to convict of perjury committed in a judicial proceeding, it must be made to appear by the allegations of the indictment, and the evidence offered to support it, that the court had jurisdiction.

CRIMINAL LAW — PERJURY — COMPLAINT — INFORMATION. — A complaint charging the offense is a necessary part of and must be filed with every information under the Texas statute, and without it the information is invalid and worthless, and confers no jurisdiction on the court. Therefore, in order to sustain an information for perjury in a judicial proceeding, such information, together with the complaint upon which it is based, must be introduced in evidence.

CRIMINAL LAW — PERJURY — INSTRUCTION REGARDING EVIDENCE TO CONVICT FOR PERJURY. — In trials for perjury in Texas it is fatal error to fail to charge the jury in words or substance that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or one credible witness corroborated strongly by other evidence, as to the falsity of defendant's statement under oath, or upon his own confession in open court," as provided by article 746, Texas Code of Criminal Procedure; article 677 thereof providing that it is imperative in felony cases that the charge "shall distinctly set forth the law applicable to the case, whether asked or not."

A CREDIBLE WITNESS under the Texas statute is one who, being competent to give evidence, is worthy of belief.

CONVICTION of perjury. One William Bean was tried in the county court in April, 1888, for the offense of carrying a pistol, at which trial the defendant here testified that Bean was not in a certain room nor in a certain house when a difficulty occurred, but was outside the same with him (defendant) and others. This evidence is the perjury assigned. The other facts are stated in the opinion.

W. H. Ledbetter, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. In all cases of prosecution for perjury committed in a judicial proceeding, it must be made to appear by the allegations of the indictment that the court had jurisdiction of the judicial proceedings (Willson's Crim. Stats., sec. 307), and it is equally important and necessary that the evidence should sustain the allegation in order to warrant a conviction. It was alleged in the indictment in this case that the judicial proceeding was a trial in the county court, "wherein one Bean was duly and legally charged by information" with unlawfully carrying on or about his person a pistol, etc. To sustain this allegation, the prosecution simply introduced in evidence the information. This was not sufficient. An information cannot be presented until oath has been made by some credible person charging the defendant with an offense: Code Crim. Proc., art. 431. This oath is called a complaint. It is the basis and foundation upon which the information rests, and is a necessary part of and must be filed with the information: *Id.*, art. 36. Without a complaint an information would be wholly invalid,—would confer no jurisdiction upon the court, and would be worthless for any purpose: Willson's Crim. Stats., sec. 1999. It follows, then, that in order to sustain an allegation of judicial proceeding by information, not only must such information be introduced in evidence, but the complaint upon which it is based or founded must be also introduced.

Another error, fundamental in character, appears upon this record. It is a fatal omission in the charge of the court to the jury. An express provision of our statute with regard to perjury and false swearing is, that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statement under oath, or upon his own confession in open court": Code Crim. Proc., art. 746; *Hernandez v. State*, 18 Tex. App. 134; 51 Am. Rep. 295; *Anderson v. State*, 24 Tex. App. 705; *Maines v. State*, 26 Id. 14.

Article 746, as thus quoted, is as much a part of the law of perjury as any other found in our Penal Code relative to that crime, and where the accused has not confessed his guilt in open court, that article, or the substance thereof, should be

given in charge to the jury, it being imperative in felony cases that the charge "shall distinctly set forth the law applicable to the case, whether asked or not": Code Crim. Proc., art. 677. It is fundamental error to fail to give such instruction: *Washington v. State*, 22 Tex. App. 36; *Gartman v. State*, 16 Id. 215; *Wilson's Crim. Stat.*, sec. 312.

"A credible witness," as used in that article, means "one who, being competent to give evidence, is worthy of belief": *Smith v. State*, 22 Tex. App. 197.

For the errors discussed, the judgment is reversed, and the cause remanded.

PERJURY—EVIDENCE NECESSARY TO CONVICT OF THE CRIME: See monographic note to *State v. Shipps*, 85 Am. Dec. 483, 503. The evidence of one witness is not sufficient to convict of the crime of perjury, as the case would then only be in equilibrium, oath weighing against oath: *Newell v. Statute*, 35 Mo. 315; 58 Am. Dec. 706.

PERJURY—JURISDICTION.—To constitute perjury it is essential that false swearing should have been committed with respect to some matter over which the court had jurisdiction: *State v. Wynberg*, 49 La. Ann. 480.

FAHEY v. STATE

[25 TEXAS APPEALS, 181.]

CONSTITUTIONAL LAW—STATUTES.—Texas acts of March 11 and April 4, 1881, levying an occupation tax and providing for the issuance of a license, are constitutional and valid, and do not contain more than one subject, namely, the exercise of the police power and that of taxation for general revenue; nor do they embrace subjects not expressed in their titles.

CONSTITUTIONAL LAW—STATUTES.—While the object of a statute may be to regulate the sale of liquors, to collect revenue, and divers other purposes and objects, still it is constitutional, unless there is more than one subject in the act.

CONSTITUTIONAL LAW—STATUTES.—Though there is more than one subject mentioned in an act, still if they are germane or subsidiary to the main subject mentioned in the title, or if relative directly or indirectly to the main subject, or so long as the provisions are of the same nature, and come legitimately under one subject or denomination, the act is constitutional and valid.

CONSTITUTIONAL LAW—STATUTES.—Though the Texas constitution empowers the imposition of occupation taxes, and requires that taxation shall be equal and uniform, still it does not necessarily mean that equality and uniformity must be provided between different classes of occupations, nor that the same conditions must be imposed upon every class as a condition precedent to the pursuit of such occupation. Hence a statute requiring that retail liquor dealers procure a license and prepay the tax imposed for a year in advance is not unconstitutional, though the

same conditions are not imposed upon all occupations, and so one county may legally impose a larger occupation tax upon one class within its limits than is imposed by another county upon the same class.

PLEADING AND PRACTICE—INSTRUCTIONS—LIQUOR LAWS.—Where a party is prosecuted under an indictment charging him with pursuing the occupation of retail liquor dealer without license, instructions are not erroneous because they substitute "without having paid the tax" for "without having obtained a license," when under the law the accused could not be convicted had he paid the tax, whether he procured the license or not. The instructions are more favorable than the law.

PLEADING AND PRACTICE—INSTRUCTIONS ASSUMING FACTS.—Where one party admits a fact at the trial, and the other party produces no evidence to prove it because of its admission, the court is justified in assuming it to exist, and so charging the jury without further proof.

Graham, Jones, and Spencer, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This is a conviction for pursuing and following the occupation of selling spirituous, vinous, and malt liquors in quantities less than one quart, without first having obtained a license therefor, and without having paid the tax required by law. This prosecution is based upon the acts of March 11, 1881, and April 4, 1881.

Appellant moved to quash the indictment upon several grounds:—

1. Because the laws of March 11, 1881, and April 4, 1881, levying the occupation tax and providing for the issuance of a license, are unconstitutional and void, in this, that said acts contain more than one subject, to wit, the exercise of the police power and that of taxation for general revenue, and embrace subjects not expressed in the titles of the bills.

2. Said acts are unconstitutional, in this, that they require the said payment of the tax to the state, county, and city in advance for the term of one year as a condition precedent to the right of pursuing said occupation, while all others are permitted to pay quarterly; and are in conflict with and repugnant to sections 13 and 19 of the bill of rights, and sections 2 and 3, article 8, of the state constitution, and the fourteenth amendment to the constitution of the United States, in this, that they require a license of persons pursuing the occupation of appellant, and of the billiard-table keeper, and require none of persons pursuing any of the other occupations taxed by law, and provide no means for obtaining a license by such other persons.

First ground: Do the acts of March 11, 1881, and April 4

1881, contain more than one subject? If so, they are void. The constitution provides that "no bill shall contain more than one subject, which shall be expressed in the title": Art. 3, sec. 35. In the preceding constitution, the word "object" was used instead of the word "subject."

Judge Bonner, in *Stone v. Brown*, 54 Tex. 341, observes that "it may be presumed that the convention had some reason for substituting a different word from that which had been so long in use in this connection; and that in the light of judicial expressions, the word 'subject' may have been thus substituted as less restrictive than 'object.'" In *People v. Lawrence*, 36 Barb. 192, the supreme court of New York say: "It must not be overlooked that the constitution demands that the title of an act shall express the subject, not the object, of the act. It is the matter to which the statute relates and with which it deals, and not what it proposes to do, which is to be found in the title. It is no constitutional objection to a statute that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers."

What, then, is the subject of the acts of March 11, 1881, and April 4, 1881? Most clearly, the subject of these acts is the regulation of the sale of spirituous, vinous, and malt liquors, and medicated bitters. Now, if there be but one subject in the act, but more than one object, the act would not be obnoxious to the constitution.

We could concede, for the argument, that the object of these acts is to regulate the sale of these liquors, to collect revenue, and divers other purposes and objects; still, unless there was more than one subject in the act, it would be valid,—constitutional.

Again: Suppose that there be more than one subject mentioned in the acts. If they be germane or subsidiary to the main subject, or if relative directly or indirectly to the main subject,—have a mutual connection,—and are not foreign to the main subject, or so long as the provisions are of the same nature and come legitimately under one general denomination or subject, we cannot hold the act unconstitutional: *Giddings v. San Antonio*, 47 Tex. 556; *Breen v. R. R. Co.*, 44 Id. 306; *Austin v. R. R. Co.*, 45 Id. 267; *Phillips v. Bridge Co.*, 2 Met. (Ky.) 222; *Smith v. Commonwealth*, 8 Bush, 112; *State v. County Judge*, 2 Iowa, 284; *Battle v. Howard*, 13 Tex. 345; *Murphey v. Menard*, 11 Id. 678; *Tadlock v. Eccles*, 20 Id. 792; 73 Am. Dec. 213.

We are of opinion that these acts do not contain more than one subject.

Second ground: "That the acts above cited require payment of the tax in advance for the term of one year as a condition precedent to the right of pursuing said occupation, while all others are permitted to pay quarterly; and hence in conflict with and repugnant to sections 13 and 19 of the bill of rights, and sections 2 and 3 of article 8 of the state constitution, and the fourteenth amendment to the constitution of the United States, in this, that they require a license of persons pursuing the occupation of appellant and of the billiard-table keeper, and require none of persons pursuing any other occupation taxed by law, and provide no means for obtaining a license for such persons."

Answer to these objections: 1. The constitution confers the power upon the legislature to impose occupation taxes: Art. 8, sec. 1. 2. But all occupation taxes must be equal and uniform upon the same class of subjects within the limits of the authority levying the tax: Sec. 2, art. 8.

Upon this occupation the state tax is the same all over the state; and if a county desires to impose a tax upon this occupation, it must be equal and uniform over the county; that is, all persons must be required to do and perform the same things as acts precedent to the right to pursue the occupation in said county, and they must pay the same amount of tax, — neither more nor less. So, within the limits of cities and towns.

It is evident that the tax imposed upon the occupation of selling in quantities less than one quart the liquors named in the acts cited is equal and uniform in the state; and it appears from this record that it is equal and uniform within the limits of Galveston County. The legislature is the authority levying the state tax; the county of Galveston, through the commissioners' court, is the authority levying the county tax within the county limits. The tax being equal and uniform in every particular over the state as to the state tax, and being equal and uniform within the limits of the county of Galveston, instead of being obnoxious to the state constitution, these acts are in strict conformity with its requirements.

The above observations apply to the objection that the persons proposing to follow this occupation must pay in advance for the term of one year as a condition precedent to the right to pursue it; while upon all others, they are permitted to pay

quarterly. This being required of all of the same class alike, the constitution is by no means infringed; and, in addition to this, the requirement is founded in the highest considerations of public policy and common sense.

It is insisted that the tax is unequal, and not uniform, "because a person pursuing the occupation in some counties would not be required to pay as much as in others; that the cities and counties are not required to assess this tax, and if they do, they may assess it at a greater or less sum in the different cities and counties, etc.; and as the penalty depends on the amount assessed, it would not be the same,—it would not be uniform over the state." This is evidently correct, but constitutes no objection to the law.

In *Texas Banking and Ins. Co. v. State*, 42 Tex. 636, an analogous question arose. The state sued the company for occupation tax. The company interposed a constitutional objection to the tax, contending that it was not equal and uniform throughout the state. The statute provided that those pursuing such occupation should pay a tax of \$250, if the business was carried on in a city or town exceeding five thousand in population. Galveston, the city in which the occupation was followed, contained a population greater than five thousand. The act also provided that if the population was less, a tax of fifty dollars should be paid.

The supreme court (opinion by Moore, J.) held that such a tax was equal and uniform; and this opinion is approved in *Blessing v. City of Galveston*, 42 Tex. 641. These opinions were rendered under the preceding constitution, which contained this provision: "Taxation shall be equal and uniform throughout the state." The present constitution settles this question beyond all controversy, there being a special provision relating to occupation taxes, which is: "All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." The limit of the state's legislative authority is the whole state; that of the county, city, or town, is their respective boundaries.

That the state tax is equal and uniform, is not questioned here. Now, if the tax imposed by the counties, cities, and towns is equal within their limits, the imposition of such tax would not be obnoxious to the constitution, but would be in exact accord with the above provisions, though in other counties, cities, or towns the tax may not be the same.

So far as the fourteenth amendment of the constitution of the United States is concerned, it certainly was not intended to prohibit the states from enacting laws regulating the traffic in these liquors, so long as they do not abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property, without due process of law, or deny any person within its jurisdiction the equal protection of laws. These acts do none of these things. If they do, then the state would not have the right to tax one occupation greater than another, nor to require a license or bond as conditions precedent to the pursuing of any occupation, unless such requirements were made of persons proposing to pursue any occupation. If this be the proper construction of the amendment, then the text-writers, and supreme courts and legislatures of most, if not all, the states have misconstrued it; for acts with like provisions in substance have been passed by nearly, if not all, the states, and have been upheld by the highest judicial authority thereof. Nor can a case be found, we assert, holding that, because of such provisions in an act, to wit, requiring payment in advance for one year, etc., such payment not being required for all occupations, is an infringement of the fourteenth amendment to the federal constitution.

Third ground: "That the indictment is defective because it does not charge that defendant had not procured a license before the finding of the indictment." The indictment alleges every element of the offense. This is no exception or proviso in the enacting clause; it is matter contained in article 112 of the code, and is defensive in its character; hence the accused must bring it forward, or it must appear on the trial that the taxes have been paid,—this being a question of fact, and not of pleading.

Appellant excepted to the following charge: "If the evidence satisfies the jury, beyond a reasonable doubt, that the defendant did, as charged in the indictment, pursue, in the county of Galveston, state of Texas, the occupation of selling spirituous, vinous, and malt liquors, in quantities less than a quart, between the first day of October, 1886, and the twenty-fourth day of January, 1887 (the date of filing the indictment), without having paid the occupation tax of \$300 to the state and \$150 to the county of Galveston, and the said taxes were then due and owing, and unpaid, to the state and county respectively, say you find the defendant guilty as charged in

the indictment, and assess his punishment, which is fine not less than \$450, nor more than \$900." The objections are,—1. That the charge does not correctly define the offense; and 2. It does not give the penalty correctly, and is upon the weight of evidence, etc.

Appellant being charged with pursuing the occupation without license, counsel for appellant contend that the charge is incorrect, because it substitutes "without having paid the tax" for "without having obtained a license," etc. If appellant had, in fact, paid the taxes and procured the license, as required by article 112, as amended March 15, 1881, he could not have been convicted, though he may not have had a license. This being so, the charge was more favorable to him than the law.

It is urged that the charge assumed a fact to have been proven, and is therefore upon the weight of evidence. The court in its charge does assume that the commissioner's court of Galveston County had assessed a tax of one half of the state tax upon the occupation. That such a tax had been assessed, there can be no doubt; this was admitted by appellant on the trial, and the state introduced no evidence to prove it because of its admission. This being the case, the court did not err in assuming this to be a fact. Nor did the court err in charging that the penalty was not less than \$450, nor more than \$900,—this proposition depending upon the foregoing.

We find no error in the judgment, and it is affirmed.

CONSTITUTIONAL LAW — STATUTES. — The constitutional provision that an act of the legislature shall relate to but one object, which shall be expressed in its title, is not violated when such act embraces several ideas or steps in the progress of its provisions toward the attainment of the main object expressed in the title: *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487; *Tuttle v. Strout*, 7 Minn. 465; 82 Am. Dec. 108; note to *Davis v. State*, 61 Id. 337-346, for a discussion of statutes embracing more than one object; and to the same effect is note to *Tuttle v. Strout*, 82 Id. 110, 111.

ERRORS FAVORABLE TO APPELLANT. — Judgments will not be reversed for errors in instructions which were favorable to appellant: *Wintz v. Morrison*, 17 Tex. 372; 67 Am. Dec. 658; *Warren v. Smith*, 24 Tex. 484; 76 Am. Dec. 115; *State v. Baltimore etc. R. R. Co.*, 24 Md. 84; 87 Am. Dec. 600.

ANDERSON AND WOODS v. STATE.

[27 TEXAS APPEALS, 177.]

CRIMINAL LAW — NEGLECT HOMICIDE — INDICTMENT for negligent homicide which defines the offense, alleges all its elements, sets forth specifically the acts and omissions of defendants, and alleges that such acts and omissions caused the death of deceased, is sufficient under article 579, Penal Code of Texas.

CRIMINAL LAW — NEGLECT HOMICIDE — WITNESS. — A party charged, either in the same or another indictment, as a principal in negligent homicide, though he may be charged under a wrong name, is not a competent witness on behalf of the defense under article 731, Texas Code of Criminal Procedure.

CRIMINAL LAW — NEGLECT HOMICIDE — BY OMISSION. — To constitute negligent homicide by omission, there must be a violation of some duty imposed by law, directly or impliedly, and with which duty defendant is especially charged. Such crime presupposes a duty to perform the act omitted, and cannot in law be imputed, except upon the predicate of duty.

CRIMINAL LAW — NEGLECT HOMICIDE BY OMISSION. — Brakemen who are riding upon an engine, and whose exclusive duty it is to act as brakemen, who have no control over the engine, which is under the exclusive operation and control of the engineer and fireman, whose duty it is to look out for obstructions, and give signals of danger, are not guilty of negligent homicide for the killing of a child run over by the engine.

CONVICTION of negligent homicide. Anderson and Woods were jointly indicted with O. Torgerson and J. A. De Cogne, the engineer and fireman on the engine on which the defendants were riding as brakemen, for negligent homicide, in striking with such engine and killing a child named Morgan, while such engine was being backed. The other facts are stated in the opinion.

R. S. Lovett, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. This appeal is from a conviction of negligent homicide of the first degree. The indictment charges the appellants and two other persons jointly with the commission of the offense. Appellants only were put upon trial, and the punishment assessed was a fine of \$250 against each of them.

We think the indictment is a good one. It follows the statute defining the offense, and alleges all the elements of said offense, setting forth specifically the acts and omissions of the defendants, and alleging that said acts and omissions caused the death of the deceased: Pen. Code, art. 579.

It was not error to refuse to permit Ducoing to testify in behalf of the defendants. It was made to appear by the state

that said Ducoing was one of the persons charged jointly with defendants with the same homicide, but charged under a different name, the true name of said Ducoing having been mistaken by the grand jury presenting the indictment. Said Ducoing was an incompetent witness in behalf of defendants, he being in fact a principal in the offense, and in reality, but under another name, charged as such in the indictment: Code Crim. Proc., art. 731.

As we view the evidence and the law applicable thereto, this conviction is not warranted. These appellants were brakemen. They had no control whatever of said engine and tender. They were riding upon the same for the purpose merely of performing their specific duties as brakemen, which duties had no connection with or relation to the homicide. It was the exclusive duty of the engineer and fireman to operate said engine carefully; to look out for obstructions upon the track; to give signals of danger when necessary. With these duties appellants were in no way concerned. They had no right to start the engine in motion, to blow the whistle, to ring the bell, to stop the engine, or otherwise to control its movements. They performed no act which connected them with the death of the child. It is only for a supposed omission of duty on their part that they have been convicted of negligent homicide. They omitted to look out for obstructions on the track. They might have seen the child in time to save its life, but they omitted to see him. Or if they did see him, they omitted to stop the train, or to signal the engineer to stop it.

Were these omissions criminal, within the meaning of the statute defining negligent homicide? We think not, because to constitute criminal negligence or carelessness there must be a violation of some duty imposed by law, directly or impliedly, and with which duty the defendant is especially charged. Mr. Wharton says: "Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested": Wharton on Homicide, sec. 72. Again, this author says, in treating of omissions by those charged with machinery, etc.: "The responsibility of the defendant which he thus fails to discharge must be exclusive and peremptory. A stranger who sees that unless a railway switch is turned, or the car stopped, an accident may ensue, is not indictable for not turning the switch, or stopping the car. The reason for this is obvious. To coerce, by criminal prosecutions, every person to supervise all other

persons and things, would destroy that division of labor and responsibility by which alone business can be safely conducted, and would establish an industrial communism, by which private enterprise and private caution would be extinguished. Nothing can be effectually guarded when everything is to be guarded by everybody. No machinery could be properly worked if every passer-by were compelled, by the terror of a criminal prosecution, to rush in and adjust anything that might appear to him to be wrong, or which was wrong, no matter how it might happen to appear. By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed": *Id.*, sec. 80. And upon the subject of omission to give warning of danger, the same author says: "The test here is, Is such notice part of an express duty with which the defendant is exclusively charged? If so, he is responsible for injury which is the regular and natural result of his omission; but if not so bound, he is not so responsible": *Id.*, sec. 81.

These rules of the common law are not inconsistent with our statute, but are in harmony therewith, as we construe it. As we understand both the common law and the statute, there can be no criminal negligence or carelessness by omission to act, unless it was the especial duty of the party to perform the act omitted. Negligence or carelessness by omission presupposes duty to perform the act omitted, and cannot, in law, be imputed except upon the predicate of duty.

In this case the evidence is uncontradicted and clear that appellants did not do any act or omit to do any legal duty, with reference to the deceased child. In law they are no more responsible for the death of the child than any other person who was present and witnessed the accident. They were strangers to the transaction in contemplation of the law, because they were not charged with any duty with respect to it.

We are of the opinion that the judgment of conviction is contrary to the law and the evidence, and therefore said judgment is reversed, and the cause is remanded.

NEGLECT HOMICIDE. — Where it appeared that the prisoner was in his door-yard quarreling with a neighbor, waving a pistol, and threatening to shoot, though not apparently intending so to do, and his wife, coming out, begged him to come in, and was shot, and in her dying declaration stated that she was accidentally shot while trying to take the pistol from her husband, under the Texas Penal Code the defendant was entitled to an instruction as to the law of negligent homicide: *Howard v. State*, 25 Tex. App. 688.

Where deceased met death in consequence of the collision of a vehicle driven by the defendants with that in which the deceased was riding, the criminal responsibility of the defendants is estimated, not so much by the question as to whether they were guilty of allowing their team to run, as the question whether their negligence and wanton recklessness was the cause directly of the collision: *Bell v. People*, 125 Ill. 584.

MEDIS AND HILL v. STATE.

[27 TEXAS APPRAIS, 194.]

CRIMINAL LAW. — JOINT VERDICT AGAINST JOINT OFFENDERS must assess a separate penalty against each, to be valid.

CRIMINAL LAW — SODOMY — ACCOMPLICE. — Where in sodomy the prosecuting witness consents to the act, he is an accomplice whose testimony must be corroborated; and where the evidence is such as to leave the question of consent in doubt, the jury must be instructed that if they find that he consented they must then find that he was corroborated, in order to convict.

McLemore and Campbell, and S. T. Fontaine, for the appellants.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. The appellants were jointly indicted, tried, and convicted of sodomy, the verdict of the jury being: "We, the jury, find Charles Medis and Ed Hill guilty as charged of sodomy, and assess the punishment at ten years' confinement in the penitentiary."

Appellants contend by their counsel that this is not a good or legal verdict. This proposition is now well settled in favor of appellants: *Flynn v. State*, 8 Tex. App. 398; *Sterling v. State*, 25 Id. 716; *Cunningham v. State*, 26 Id. 83; *Calico v. State*, 4 Ark. 430; *Straughan v. State*, 16 Ark. 37.

Appellants were charged with committing the act upon one Milton Werner. Upon the trial, Werner was introduced as a witness for the state, and his testimony was relied on for a conviction. The court failed to give instructions to the jury relating to the necessity of corroborating said witness, — counsel for appellants contending that Werner was consenting, and was therefore an accomplice. Upon this subject, says Bishop: "When this offense is committed on a non-consenting person who becomes a witness, it appears that his early complaint may be shown in corroboration, the same as those of the injured woman in rape. If such person had con-

sented, he would be an accomplice whose testimony would for this reason need corroboration": 2 Bishop's Crim. Law, 1018.

Werner was evidently consenting; but if the evidence should leave this in doubt, it would then become a question for the jury, and not the court, to determine, under the proper instructions, whether the person was or was not consenting; and the jury should in such a case be instructed that if they found that he was consenting, then they must find that he was corroborated.

Reversed and remanded.

CRIMINAL EVIDENCE — ACCOMPLICES. — One cannot be convicted upon the testimony of an accomplice, unless corroborated by other evidence tending to connect defendant with the crime committed: *Blakeley v. State*, 24 Tex. App. 616; 5 Am. St. Rep. 912, and note 917; *People v. Kraber*, 72 Cal. 459; 1 Am. St. Rep. 65, and note 67. Compare *People v. Douz*, 64 Mich. 717; 8 Am. St. Rep. 873, and note 876.

DEMPSEY v. STATE.

[27 TEXAS APPEALS, 209.]

MALICIOUS PROSECUTION — INFORMATION. — In an action for malicious prosecution under article 273, Penal Code of Texas, it is not necessary to allege in the information that the alleged malicious prosecution had ended before the information was presented.

MALICIOUS PROSECUTION — MALICE. — To convict for malicious prosecution, the prosecution alleged to have been malicious must be proved to have been actuated by malice.

MALICIOUS PROSECUTION. — **LEGAL MALICE** is an unlawful act done willfully and purposely to the injury of another.

MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE. — To convict for malicious prosecution, it must be proved that there was legal malice actuating the wrong done, and also want of probable cause for instituting the alleged malicious prosecution; and though it was actuated by malice, still defendant cannot be convicted if the proof shows that he had probable cause for instituting the prosecution.

MALICIOUS PROSECUTION. — **PROBABLE CAUSE** is the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted.

MALICIOUS PROSECUTION — EVIDENCE. — In criminal malicious prosecution based upon a discharge from a criminal charge, the evidence of the justice before whom the first trial was had, that the evidence there was not sufficient to sustain the charge, is inadmissible, and calculated to injure defendant.

CONVICTION for malicious prosecution. The opinion states the facts.

J. D. Owen, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. This prosecution is under article 273 of the Penal Code, which reads: "If any person in this state, for the purpose of extorting money from another, or the payment or security of a debt due him by such other person, or with intent to vex, harass, or injure such person, shall institute, or cause to be instituted, any criminal prosecution against such other person, he shall be deemed guilty of malicious prosecution, and upon conviction, shall be fined not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not less than one month nor more than one year." This article of the Penal Code is an addition to the original code made in revising, and this is the first conviction thereunder which has been before this court.

In the information the charge is alleged as follows: "Did then and there unlawfully, for the purpose and with the intent to vex, harass, and injure one Thomas Kelley, willfully institute, and cause to be instituted, against the said Thomas Kelley, in justice's court of precinct number one of Jackson County, Texas, a criminal prosecution, as follows, to wit: 'The State of Texas v. Thomas Kelley, number eighty-three,' charging the said Thomas Kelley, by complaint made before H. T. Chivers, county attorney of said county, which complaint was filed by William Payson, the justice of the peace in and for said precinct number one, with unlawfully and willfully tying and staking out, and causing to be tied and staked out, to graze within the inclosed lands of the said Daniel Dempsey, a horse."

We are of the opinion that the information is a good one. It follows the words of the statute, and is sufficiently specific. The specific exception made to it, that it does not aver that the prosecution against Kelley had ended before the presentment of the information, is not well taken, as the statute makes no such requirement. In a civil suit for damages for malicious prosecution, it is essential to allege and prove that the alleged malicious prosecution had terminated before the institution of the suit, because in such case it cannot be known whether or not there was any injury until there has been an acquittal of the charge, nor what the extent of the injury might be. And a civil suit is not maintainable at all if there has been a conviction upon the criminal charge: *Glasgow v.*

Owen, 69 Tex. 167; *McManus v. Wallis*, 52 Id. 535; *Usher v. Skidmore*, 28 Id. 617; 2 Greenl. Ev., sec. 452; Cooley on Torts, sec. 186. But it does not appear to us that the above-stated rule is applicable in the case of a criminal prosecution under article 273 of our Penal Code. In such case we think it is immaterial whether or not the alleged malicious prosecution had terminated at the time of the filing of the indictment or information. The reason for the rule in a civil suit does not exist in the criminal case, and it does not seem to be contemplated by said article that it shall exist in such case.

There are certain rules, however, governing in a civil suit for malicious prosecution, which, in our opinion, obtain in a criminal prosecution such as the one before us. These rules are not expressly declared or required to be observed by article 273, but they are, nevertheless, within the intention of that article. The first of these rules is, that the prosecution alleged to have been malicious must be proved to have been actuated by malice. Legal malice is defined as follows: "Any unlawful act done willfully and purposely, to the injury of another, is, as against that person, malicious." This wrong motive, when it is shown to exist, coupled with a wrongful act, willfully done to the injury of another, constitutes legal malice: *Ramsey v. Arrott*, 64 Tex. 322; *Glasgow v. Owen*, *supra*.

The second rule is, that there must not only be legal malice actuating the wrong done, but there must be a want of probable cause for instituting, or causing to be instituted, the alleged malicious prosecution, and the evidence on the trial must show such want of probable cause. "By probable cause is meant the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted": *Ramsey v. Arrott*, *supra*; *Glasgow v. Owen*, *supra*; *Gabel v. Weisensee*, 49 Tex. 131.

In this prosecution, therefore, as we construe the statute creating this offense, it was essential for the state to prove,—
1. That the defendant instituted, or caused to be instituted, against Kelley the prosecution named in the information, being actuated thereto by malice, with the purpose and intent to vex, harass, and injure said Kelley; 2. That he instituted, or caused to be instituted, said prosecution without probable cause, as that term has been above defined.

It is certainly not the meaning and intent of the statute to

justified one for prosecuting supposed crime, will deal so with probable cause, although it may be in for the purpose of vexatious harassing and ruining the person prosecuted. To observe and consider the statute would it seem to be made to operate another public policy. It would deter citizens from recommending efforts to bring criminals to justice. A man would fear to bring a prosecutorial, however meritorious it might be, knowing that he might himself be prosecuted and punished merely upon proof that he commenced it for the purpose and with the intent to vex, harass, and injure the prosecuted party, without regard to the evidence of such party's guilt of the charge.

As we understand the statute it is intended to punish a person who without probable cause, actuated by malice, not in good faith, institutes a criminal prosecution against another for the purpose and with the intent to vex, harass, and injure such other person. It is intended to prevent groundless prosecutions, and not such as there is legal evidence to justify a reasonable belief that the person prosecuted is guilty of the crime charged.

In this case, while the evidence is perhaps sufficient to show that the defendant was actuated by malice,—by a purpose and intent to vex, harass, and injure Kelley by the criminal prosecution,—it further shows that he had probable cause for instituting such prosecution. It shows that Kelley was a principal in the offense of staking out the horse in the defendant's inclosure, and was in fact guilty of the charge preferred against him in the alleged malicious prosecution. We are of the opinion, therefore, that this conviction is unwarranted by the evidence and the law.

We are further of the opinion that the court erred in permitting the justice of the peace to testify that, in the alleged criminal prosecution against Kelley, he discharged said Kelley. In his opinion, there was not sufficient evidence to sustain the charge. We think the result of that prosecution immaterial, and the opinion of the justice of the peace as to the sufficiency of the evidence was clearly incompetent and calculated to injure the defendant. In view of the errors mentioned, the judgment is reversed, and the case remanded.

WILLARD v. STATE.

[27 TEXAS APPEALS, 385.]

CRIMINAL LAW — CORPUS DELICTI — EVIDENCE. — To convict of crime, the *corpus delicti* and the identity of the accused with the criminal act must be established. This may be done by circumstantial as well as by direct evidence, if satisfactory to the understanding and conscience of the jury beyond a reasonable doubt.

CRIMINAL LAW — CORPUS DELICTI. — CONFESSION alone will not sustain conviction of crime in the absence of corroborative proof of the *corpus delicti*.

CRIMINAL LAW — CORPUS DELICTI — CONFESSION — INSTRUCTIONS. — While it is true that the *corpus delicti* consists, not only in the crime, but also in defendant's connection therewith, and that a confession alone will not sustain a conviction, but the *corpus delicti* in both respects mentioned must be shown by other proof, still, in a proper case, the jury may be charged, when the evidence sustains it, that to establish the *corpus delicti* they may consider defendant's statements in connection with the other proof.

B. F. Cotton, J. T. Hammons, and C. F. Clint, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This is a second appeal from a judgment of conviction in this case: See *Willard v. State*, 26 Tex. App. 126. After a most thorough reading of the record in this appeal, we are of opinion that there is but one question raised of sufficient moment to require a discussion at our hands.

It is most urgently insisted that there is no evidence of appellant's guilty agency in the alleged theft of the animal save his own confession, or admissions amounting to a confession, and that this confession or admission, being uncorroborated, is not sufficient in law to warrant his conviction. In other words, it is contended that the *corpus delicti* of a crime cannot be proven alone by the confessions of a party charged with the crime.

In all criminal prosecutions, the rule is elementary that, to sustain a conviction, two things must be established, — 1. A criminal act; and 2. Defendant's agency in the production of such act: Wharton's *Crim. Ev.*, 8th ed., sec. 325; 3 *Greenl. Ev.*, sec. 30. In other words, there must be proof of the *corpus delicti* and the identity of the prisoner. But whilst this is so, there is no one kind of evidence to be always demanded in proof of the *corpus delicti* any more than of any other fact. It can seldom be proven by direct or positive testimony, and may be lawfully established by circumstantial evidence, pro-

vided it be satisfactory to the understanding and conscience of the jury beyond a reasonable doubt: *Brown v. State*, 1 Tex. App. 154, and authorities cited; *Merritt v. State*, 2 Id. 177.

With regard to confessions, Mr. Wharton says: "While voluntary confessions of specific charges or of inculpatory facts are always admissible under the conditions above stated, they cannot sustain a conviction unless there be corroborative proof of the *corpus delicti*"; and he cites a long array of authorities in support of the proposition: Wharton's Crim. Ev., 8th ed., sec. 632. "It should be remembered," he says, "that the *corpus delicti* consists, not merely of an objective crime, but of the defendant's agency in the crime; and unless the *corpus delicti* in both these respects is proved, a confession is not by itself enough to sustain a conviction": Id., sec. 633.

Defendant's counsel requested a special instruction upon this point, which the court refused, because, as stated by the learned judge, "not the law, as I understand it. A confession, in some cases, uncorroborated, might be insufficient to establish the *corpus delicti*, but I think certainly in this case the jury may consider defendant's statements in connection with the other proof in determining the matter." There is no doubt of the correctness of the latter proposition as stated by the court. We have seen from the authorities that he is mistaken as to his first declaration, that such an instruction would not be the law. The question is, If it should occur that the court erred in its opinion as to the correctness of the proposition of law, did the refusal of the instruction materially injure the rights of the defendant in this case? Was the instruction a part of the law applicable to the facts, and necessary to be given independently of the law as submitted in the general charge? In this case, the court plainly, and as we think fully, instructed the jury upon all the legitimate phases of the testimony, including an elaborate instruction upon circumstantial testimony.

Now, let us recur to the evidence in the case. The alleged stolen animal was a noted cow, and so peculiar was the size and shape of her horns that "she was known as Old Broad-horns." The horns were, in addition to their length and size, very peculiarly turned and shaped. As described by the witness Brashear, "she had noted horns, very large, growing out towards the front, twisted up, and flared out at the top. . . . Everybody in the whole country and settlement knew the cow by her horns." This cow was fat when last seen on her range

near defendant's house. Defendant and his brother butchered beeves at their pen. The cow was missed from her accustomed range on the 10th of January. Shortly afterwards, Holloway, the alleged owner, started to hunt for her, and went to defendant's house. As soon as defendant saw him, defendant looked excited and uneasy, and went back to the house. Defendant's brother remained, and Holloway found, in looking around in the field among the weeds behind the stable, several cow-heads and cow-hides cut all to pieces, and among these heads he found the head of his cow. He swears positively and emphatically: "These horns I know came from the cow above described, and I identified the same." Defendant and his brother denied at that time that they knew anything about the killing of the cow. That afternoon, however, Holloway went back to see them, and at this time the defendant admitted that he had killed the cow, and proposed to pay, and finally agreed to pay, fifteen dollars for her. We are of opinion that, independent of the defendant's confession, the evidence was strong and cogent that the cow had been killed, and at least that he was a guilty agent in the crime. We are not prepared to say that the evidence would not have been sufficient without his confession; there can be no question but that it abundantly corroborates his confession.

This being so, was it necessary that the court, in addition to the general charge as given, should have given defendant's special requested instruction with regard to the necessity for corroboration of the confession in order to establish the *corpus delicti*? Under the peculiar facts of this case and the charge as given, we do not think the law of the special instruction was essential, nor can we perceive how any possible injury could have been done defendant by the refusal to give it.

We are of opinion that the evidence, outside the confession, establishes beyond all reasonable doubt that the animal was identified as the property of the prosecutor, and that it had been stolen and killed, and that the evidence sufficiently establishes the guilty agency of the appellant. And whilst the instruction, in a proper case, was unquestionably correct as a legal proposition, we are of opinion it would have been unjust to the prosecution to have given it in this case, because it would, perhaps, have misled the jury to the erroneous conclusion that the *corpus delicti* had not been sufficiently proven, independently of the confession, and have created a doubt where, in our opinion, no doubt could or should legally have existed.

Other errors assigned and insisted upon are not deemed by us reversible in their character in so far as the same appear to be supported by the record. Most of them are so fully explained by the record that they are made to appear entirely harmless or without merit.

We have found no error requiring a reversal, and the judgment is affirmed.

CRIMINAL LAW — CORPUS DELICTI. — The identity of the victim need not be established by direct evidence to sustain a conviction for murder or manslaughter. The *corpus delicti* is the existence of the criminal fact: *People v. Palmer*, 109 N. Y. 110; 4 Am. St. Rep. 423, and note 431. The *corpus delicti* may be proved by circumstantial evidence: *State v. Cardelli*, 19 Nev. 319; though it must be proved beyond a reasonable doubt: *Lee v. State*, 76 Ga. 496; and circumstantial evidence which proves the *corpus delicti* must be strong and cogent: *State v. Davidson*, 30 Vt. 377; 73 Am. Dec. 312; *State v. Williams*, 7 Jones, 446; 78 Am. Dec. 248. Confessions alone are not sufficient proof of the *corpus delicti*, but they must be in connection with other facts before they will suffice: Note to *State v. Williams*, 78 Id. 254, 255. The *corpus delicti* may be established by circumstantial evidence: *State v. Cardelli*, 19 Nev. 319.

SHELTON v. STATE.

[27 TEXAS APPEALS, 442.]

CRIMINAL LAW — CARRYING PISTOL — "PERSON TRAVELING." — Whether a person carrying a pistol is a "person traveling," within the meaning of the Texas statute, so as to exempt him from prosecution, is a question of fact for the jury.

CRIMINAL LAW — CARRYING PISTOL — PERSON TRAVELING. — A person carrying a pistol, and fleeing from officers to evade arrest, is not a "person traveling," within the meaning of the Texas statute, so as to exempt him from prosecution.

CRIMINAL LAW — VENUE. — To convict of crime, the venue must be proved as alleged.

CONVICTION for unlawfully carrying a pistol. No facts appear, except those stated in the opinion.

Stevens and Herbert, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. It was not error to overrule the motion in arrest of judgment. There is no material variance between the complaint and the information, and there is no material defect in the verdict.

Whether or not the defendant at the time he carried the pistol was "a person traveling," was a question of fact for the

determination of the jury, and this issue was fully and fairly submitted to the jury by the charge of the court. We are of the opinion that the evidence warranted the jury in finding against the defendant upon said issue. It was shown that at the time defendant carried the pistol he was fleeing from the officers of the law to evade arrest. It is not the intention of the law to license fugitives from justice to carry arms. They are not "persons traveling," within the meaning of the exception in the statute.

There is no proof in the record of the venue of the offense, and therefore the conviction must be set aside. This error is confessed by the assistant attorney-general.

The judgment is reversed, and the cause remanded.

CARRYING WEAPONS UPON A JOURNEY: See *Stilly v. State*, 27 Tex. App. 445, *infra*, and note 203.

STILLY v. STATE.

[27 TEXAS APPEALS, 445.]

CRIMINAL LAW — CARRYING PISTOL — "PERSON TRAVELING." — A party making a journey of fifty miles in a wagon with his family is a "person traveling," within the meaning of the Texas statute, so as not to violate the law by carrying a pistol upon his person during such time, and he may so carry it at a wagon-yard where he makes a temporary stop, or in a town during a temporary cessation in his journey for legitimate purposes, as to procure a conveyance, purchase provisions, or transact other business legitimately connected with his journey; but such statute will not protect him from arrest while on the journey and in a town, but sitting at a table in a gambling-house with others, with the pistol on his person, and not engaged in any business connected with the journey.

CRIMINAL LAW — CARRYING PISTOL — "PERSON TRAVELING" — EVIDENCE. — A party making a journey, but temporarily stopping in a town, and seated at a gambling-table with others, with a pistol on his person, is *prima facie* guilty of a violation of the Texas statute against carrying arms, except as to "persons traveling," and it devolves upon him to establish the facts or circumstances upon which he relies to excuse or justify the prohibited act.

Mathis and Lewis, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. This conviction is for unlawfully carrying a pistol upon the person. It is claimed by the defendant that the conviction is wrong for two reasons: 1. That at the time he carried the pistol he was a "person traveling"; and 2.

That he had reasonable ground for fearing an unlawful attack upon his person, etc.

A "person traveling" may lawfully carry upon his person a pistol or other weapon: Pen. Code, art. 319. In this case the evidence shows that the defendant, accompanied by his wife and child, left his residence in the Indian Territory to go to Bloomfield, in Cooke County, a distance of fifty miles, to the home of defendant's wife's parents. They traveled in a wagon. Two other persons went with them in the wagon, who intended to and did stop at Gainesville, which place was on the route to Bloomfield. They reached Gainesville at night, and stopped at a wagon-yard. Defendant left his wife, child, and companions at the wagon-yard, saying that he would go into town and try and hire a hack to take his wife and child on to Bloomfield that night, as the team which had brought them to Gainesville was fatigued and he did not wish to drive it farther that night. He was shortly afterwards arrested in a gambling-house, while he was sitting at a table with other persons, and a pistol was found upon his person.

We are clearly of the opinion, while he was making the journey from his home to Gainesville, and while he was at the wagon-yard where he had stopped, he was a "person traveling" within the meaning of the statute, and did not violate the law in carrying a pistol upon his person during said time. We are also of the opinion that he might lawfully have carried the pistol upon his person in the town of Gainesville during a temporary cessation of his journey, and for a legitimate purpose, such as to procure a conveyance, or provisions, or to transact other business connected with the prosecution of his journey. But beyond this we do not think the law intends to protect him.

It would be an unreasonable interpretation of the intent of the law to hold that a person traveling might stop in a town or city, and idly stroll through its streets and visit its gambling-dens and saloons and public places, armed with a pistol. The practical result of such an interpretation of the statute would cause our cities and towns to be infested with armed men, while the citizens of such places would be prohibited from carrying arms to protect themselves from these privileged characters. We are of the opinion, therefore, that the evidence does not show that the defendant, at the time he was found in the gambling-house, with the pistol upon him, was a "person traveling" within the meaning of the statute. He was not

then traveling. He was not engaged in any business connected with his journey. If he was so engaged, it devolved upon him to show it, which he failed to do. His having the pistol upon his person at the time, place, and under the circumstances proved, made a *prima facie* case of guilt against him, and it devolved upon him to establish the facts or circumstances on which he relied to excuse or justify the prohibited act: Pen. Code, art. 51.

As to the other defense claimed by the defendant, the evidence does not establish it. No such danger existed as is contemplated by the statute, and the court did not err in refusing the special instructions requested by the defendant.

We are of the opinion that there is no error in the conviction, and it is affirmed.

CARRYING WEAPONS. — Where defendant lived in Arkansas, and had been to Memphis, and on his return had stopped a few hours at Mariana, Arkansas, carrying two pistols on his person, while at Mariana he was not "upon a journey" within the meaning of the statute: *Carr v. State*, 34 Ark. 486; 36 Am. Rep. 15. Where a defendant carried concealed weapons in returning in a wagon from a town in one county to his home in another county, a distance of twenty-three miles, he was not "traveling" within the meaning of the statute: *Gholson v. State*, 53 Ala. 519; 25 Am. Rep. 652. Compare the case of *Shelton v. State*, 27 Tex. App. 443, ante, p. 200.

KING v. STATE.

[27 TEXAS APPEALS, 567.]

CRIMINAL LAW — FORGERY — INDICTMENT. — Where the writing declared a forgery is so incomplete as not to disclose on its face a legal liability, then, to make it the technical subject of forgery, the indictment must aver such extrinsic facts as will invest the instrument with legal force, and show that, if genuine, it would form the basis of a legal liability.

S. C. Upshaw, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. As set forth in the indictment, the offense was charged in the following language, viz.: "That William King did, in the county of Hill, and state of Texas, on or about the first day of December, A. D. 1888, then and there, willfully, knowingly, and fraudulently attempt to pass as true, to H. R. Smith, a forged instrument in writing to the tenor following:—

'Weighed on Fairbanks Standard Scale, Dec. 1, 1888.

Load of one load of corn,

From Sam Simpson

To Patty and Brockington.

On gross 2,513 lbs.

Off tare 1,011 lbs.

Fees net, 1,502 lbs.

Net bus. Weigher' (space for figuring on back side).

Which said instrument purported to be the certificate for said Sam Simpson of one load of corn weighed on said scales for the account and benefit of Patty and Brockington, and which said instrument, if true, would have created a pecuniary obligation on said Patty and Brockington to pay to the legal owner and holder thereof for 1,502 pounds of corn; which said instrument in writing the said William King then and there knew to be forged, and did then and there attempt to pass the same as true, with intent to injure and defraud; contrary to law, and against the peace and dignity of the state."

A motion was made to quash the indictment, which was overruled by the court. The assistant attorney-general confesses error, and admits that, "upon the face of the indictment, the instrument (declared on) does not create any liability upon the part of any one to be responsible for anything. 2. There are no innuendo averments showing the facts or reasons why the said instrument created such liability; nor are there requisite explanations set out that make the alleged forged instrument a forged instrument in law."

"If a writing is so incomplete in form as to leave an apparent uncertainty in law whether it is valid or not, a simple charge of forging it fraudulently, etc., does not show an offense, but the indictment must set out such extrinsic facts as will enable the court to see that, if it were genuine, it would be valid": 2 Bishop's *Crim. Law*, 7th ed., sec. 545. And "when an instrument is incomplete on its face, so that, as it stands, it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force": 1 Wharton's *Crim. Law*, 8th ed., sec. 740; and see the subject fully discussed in *Hendricks v. State*, 26 Tex. App. 179; 8 Am. St. Rep. 463; see also *Anderson v. State*, 20 Tex. App. 595;

Rollins v. State, 22 Id. 548; *State v. Wheeler*, 19 Minn. 98; 1 Green's Crim. Law Rep. 541.

We are of opinion the motion to quash the indictment should have been sustained, and that the court erred in overruling it.

The judgment of the court below is reversed, and because the indictment is fatally defective in setting out the offense attempted to be charged, the prosecution thereunder is dismissed.

FORGERY. — The general rule, that the false making of an instrument void on its face is not a forgery, has this limitation, that when the instrument does not appear to have any legal validity, or show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offense is complete, and an indictment averring the extrinsic facts will be supported: *Rembert v. State*, 53 Ala. 467; 25 Am. Rep. 639.

COFFELT v. STATE.

[27 TEXAS APPEALS, 608.]

CRIMINAL LAW — ROBBERY — EVIDENCE. — Where an indictment for robbery unnecessarily describes the money taken as "lawful money of the United States of America," such description must be proved, and an absence of such proof is ground for a new trial.

CRIMINAL LAW — ROBBERY — VARIANCE. — Where an indictment for robbery alleges that the money was taken from the person of the party robbed, and the proof shows that the accused presented a pistol at the party robbed, and afterwards struck him, and he, in fear of his life, or of serious bodily harm, delivered his money, this is a sufficient taking to support the indictment, under article 723, Penal Code of Texas.

Scott and Jenkins, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This is a conviction for robbery. The indictment charges that appellant "did then and there, in and upon the body of W. H. Flippin, make an assault, and did then and there by said assault and by force and violence to the said W. H. Flippin, in fear of life and bodily injury, fraudulently, and without the consent of the said W. H. Flippin, take from the person and possession of the said W. H. Flippin, who was then and there the owner thereof, five certain twenty-dollar gold pieces of the value of twenty dollars each, good and lawful gold coins of the United States of America; also one certain five-dollar gold coin, good and lawful money of the United

States of America, of the value of five dollars; also two ten-dollar bills of the denomination of ten dollars each, good and lawful money of the United States of America, of the value of ten dollars each; also one five-dollar bill of the denomination of five dollars, good and lawful money of the United States of America; also five silver dollars, good and lawful money of the United States of America, of the value of one dollar each," etc.

Counsel for appellant assigns for error the overruling of the motion for new trial based upon the insufficiency of the evidence to support the verdict, "because there was no evidence showing the kind or value of any of the money, as alleged in the indictment." All of the money is alleged to be the lawful money of the United States of America. It is contended that the proof fails to show that any of the money was the coin or bills of the "United States of America." Unquestionably this is a description of the coins and bills alleged to have been taken from Flippin, and hence a description of the particular offense charged against appellant. This being the case, while an unnecessary description, still it must be proved: *Childers v. State*, 16 Tex. App. 527; *Gray v. State*, 11 Id. 411; *Cameron v. State*, 9 Id. 336; 21 Id. 212.

The indictment alleges that the robbery was effected by an assault upon the body of Flippin, and also by force and violence to the said Flippin. There is no allegation that it was effected by "putting him in fear of life or bodily injury." Something is said in the indictment about fear of life or bodily injury, but there is no allegation that Flippin was put in fear of anything.

The indictment alleging that appellant took the money from the person of Flippin, and the proof showing that Flippin delivered the money to the appellant, counsel for appellant contends that there is a variance, and that the allegation that appellant took the money is not sustained by the proof. What are the facts bearing upon this point? Flippin says that appellant and Tom Price galloped to his house about sundown; that the first he saw of them to know them they had their pistols in his face, and said, "Hand up your checks, God damn you; dig up that pot that you have got buried. It is money that we want. Dig it up; we know that you have got it. Dig it up, God damn you; dig it up." Tom Price hit him on the side of the head with a pistol, and he gave Price his pocket-book, and he handed it to appellant.

Now, it is contended that this does not show a taking of the money, but a delivery of the money by Flippin through fear. A presents a cocked pistol toward B and demands his money. B, through fear of loss of life or great bodily injury, delivers to A his money. We are seriously told that A did not take B's money. The authorities and common sense say that he did take B's money. But counsel for appellant admits this would be a taking of the money but for article 723 of the Penal Code. This article has no reference whatever to the state of facts presented in this record. They are provided for in article 722. This is evident, because appellant and Price not only exhibited fire-arms, but used them in the commission of the offense, and in such a case the punishment may be for life, while the penalty for a violation of article 723 is not less than two nor more than five years.

As the case will have to be tried again, we will not give our views on the evidence. Because the state failed to prove that the money taken was United States money, as alleged, the judgment is reversed, and the case remanded for another trial.

ROBBERY — WHAT CONSTITUTES, AND THE ESSENTIAL ELEMENTS OF THE CRIME: See monographic note to *State v. McCune*, 70 Am. Dec. 178-191; note to *State v. Calhoun*, 2 Am. St. Rep. 256.

EX PARTE ROBERTSON.

[27 TEXAS APPEALS, 628.]

CONTEMPT. — **CIVIL CONTEMPTS** are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the advantage of another party to the proceeding.

CRIMINAL CONTEMPT IS AN ACT in disrespect of the court or of its process, or which obstructs the administration of justice, or tends to bring the court into disrepute.

CONTEMPT. — **JUSTICE OF PEACE MAY**, under the Texas statute, fine an officer of the court for civil contempt in failing and refusing to execute its process, and may direct that such fine inure to the benefit of plaintiff in a sequestration proceeding, and in addition to such fine the court may order the officer committed to imprisonment until the fine is paid.

CONTEMPT — FINE — IMPRISONMENT FOR DEBT. — Fine imposed for civil contempt is not a debt within the meaning of the Texas constitution declaring that "no person shall ever be imprisoned for debt."

CONTEMPTS — JUDGMENT — COMMITMENT. — Either the order or judgment finding a party guilty of civil contempt in disobeying the command of the court, and the order of commitment for such contempt, must recite that it was in defendant's power to perform the required act, or the commitment is void.

Carleton and Ruggles, for the relator.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. In this case an original writ of *habeas corpus* was granted, returnable to this court, on the petition of applicant alleging that he is illegally restrained of his liberty by the sheriff of Travis County acting by virtue of a certain writ of commitment issued by one J. A. Stuart, a justice of the peace in and for precinct No. 3 of Travis County, Texas, on the eighth day of April, 1889. Said order or writ of commitment being in words and figures as follows, to wit:—

“The State of Texas, to the sheriff of Travis County, greeting:—

“Whereas, a judgment was rendered by me, J. A. Stuart, a justice of the peace in precinct No. 3 in the county of Travis, adjudging W. M. Robertson guilty of contempt of court, and a fine of \$39.19 was entered against said Robertson, and judgment was by me rendered on the eighth day of April, A. D. 1889, that the state of Texas recover of the said defendant, W. M. Robertson, the sum of thirty-nine and 19-100 dollars, the fine assessed by the court, and all costs, amounting to the further sum of 60-100 dollars, these are therefore to command you forthwith to take into custody and keep him, the said W. M. Robertson, until the above fine and costs are paid as provided by law.

“Herein fail not, but execute this warrant of commitment as the law directs, and fail not to return the same, with your indorsement thereon how it was executed.

“Given under my hand at office, this the eighth day of April, 1889.

“J. A. STUART, Justice of the Peace,

“Precinct No. 3, Travis Co., Texas.”

It is claimed that said commitment is illegal and unauthorized by law, and exceeds the limits within which our statutes permit justices of the peace to fine in cases of contempt; the provision of the statute being that “they shall have power to punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars, and by imprisonment not exceeding one day”: R. S., art. 1541.

If the fine imposed had been for a criminal contempt, this statute would have been applicable and the objection would have been fatal to the proceeding. Such, however, does not appear to have been the nature of the proceeding. It is shown that the applicant, Robertson, as constable, was fined by the

justice for failing and refusing to execute and return according to law a writ of sequestration issued in a certain civil cause pending in the justice's court, wherein one A. A. Cooper was plaintiff and one E. O. Sanford was defendant; that a motion was made against said constable by the plaintiff, Cooper, to have him fined for failing to execute said writ, upon the hearing of which the court adjudged him "guilty of a contempt of court for failing and refusing to execute and return said writ," and that he "be fined in the sum of thirty-nine dollars and nineteen cents, which said sum, when collected, shall inure to the benefit of A. A. Cooper, the plaintiff in said cause," and that the "said Robertson be committed to the county jail of Travis County, Texas, until said sum of thirty-nine dollars and nineteen cents, together with all costs, is paid into this court." This was the judgment upon which the order and writ of commitment set forth above were issued. The justice based his action upon the provisions of article 4539 of the Revised Statutes, which declares that "if any constable shall fail or refuse to execute and return according to law any process, warrant, or precept to him lawfully directed and delivered, he shall be fined for a contempt, on motion of the party injured before the court from which such process, warrant, or precept issued, in any sum not less than ten dollars nor more than one hundred, with costs; which fine shall be for the benefit of the party injured; and said constable shall have ten days' notice of such motion." It seems that all the provisions and requirements of this statute were substantially, if not literally, observed in the proceedings which resulted in the justice's judgment, but it is insisted for applicant that, whilst it may be conceded that under this statute the justice had the authority to fine the constable, still the statute gives him no authority to commit him to jail as for a contempt until such fine and costs were paid.

Contempts are of two kinds, civil and criminal. "Civil contempts are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while criminal contempts are all those acts in disrespect of the court, or of its process, or which obstruct the administration of justice, or tend to bring the court into disrepute," etc.: Rapalje on Contempts, sec. 21.

Contempts are also classified into direct and constructive contempts. Direct contempts are punishable summarily,

while constructive contempts require a different and less summary process. We have already seen that for what may be termed criminal or direct contempts, our statute above quoted (Rev. Stats., art. 1541) expressly provides that the party may be fined and imprisoned.

The question is, the statute (Rev. Stats., art. 4539) being silent as to the imprisonment for constructive or civil contempt, Can the court inflict imprisonment as part of the punishment for said character of contempt?

Our supreme court, in the case of *Edrington v. Pridham*, 65 Tex. 612, which was a case involving a question of civil or constructive contempt, say: "The proceeding for contempt can properly end only in a judgment of acquittal and discharge, or conviction and sentence. The punishment is by fine or imprisonment, or both: Rev. Stats., art. 1120; Rapalje on Contempts, sec. 128. The proceeding is generally regarded as a prosecution for an offense: *Id.*, sec. 95; *Williamson's Case*, 26 Pa. St. 9. We know no authority for awarding in such proceeding, as a softer penalty, or as a means to the same end, a judgment in favor of the private prosecutor for a sum of money to be collected by execution. In some jurisdictions for contempt in civil cases depriving a litigant of some right, the court is authorized by statute to require the offender to restore the *status quo*, or pay the damages, but the order is enforced by commitment: *Robins v. Frazier*, 5 Heisk. 100; *In re Day*, 34 Wis. 638."

In his able work on contempts, Mr. Rapalje says: "An examination of the authorities, English and American, discloses five different kinds of imprisonment for civil and criminal contempts: 1. Imprisonment, in the first instance, by way of punishment for a criminal contempt; 2. Imprisonment for the non-payment of a fine imposed as such punishment; 3. Imprisonment for non-payment of a fine or penalty imposed as a compensation to the person injured by the violation of an order or decree in a civil action; 4. Imprisonment to compel compliance by a party or witness with the requirements of an order or decree of the court; and 5. Imprisonment for non-payment of costs": Sec. 130.

Again, the same learned author lays it down as a rule that "where a statute authorizes or prescribes the infliction of a fine as a punishment for contempt of court, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine is paid, although there be no specific

affirmative grant of power in the statute to make such direction": Sec. 129, p. 180; citing *Fisher v. Hayes*, 6 Fed. Rep. 63; *Ex parte Crittenden*, 62 Cal. 534.

In an able article on criminal contempts, in the fifth volume of the Criminal Law Magazine, the distinguished writer, Mr. Seymour D. Thompson, says, with regard to imprisonment for the non-payment of a fine imposed as an indemnity to a party: "The principles governing this species of imprisonment appear to be, for the most part, substantially the same as in cases of imprisonment for the non-payment of a fine imposed as a punishment for a criminal contempt"; and with regard to this latter, he says that "unless otherwise provided by statute, the ordinary form of the judgment is, that the party is committed to jail until the fine and costs are paid." A party committed for not paying a fine imposed on him for contempt must be confined within the walls of the prison: *People v. Bennett*, 4 Paige, 282.

But it is insisted in this proceeding that the fine and imprisonment inflicted upon the officer, being imposed for the purpose of securing and enforcing the payment of a debt due to the plaintiff, A. A. Cooper, in the sequestration suit, is in contravention and violative of the eighteenth section of the bill of rights of the constitution, article 1, which declares that "no person shall ever be imprisoned for debt."

In the article of Mr. Thompson, above referred to, he says, speaking of this character of fines: "Such a fine is in no sense a civil debt." In *Dickson v. State*, 2 Tex. 481, it is said the words "imprisonment for debt" had a well-defined and well-known meaning, and have never been understood or held to apply to criminal proceedings, nor to imprisonment inflicted as a punishment consequent upon a violation of the laws and a contumacious refusal to submit to the pecuniary penalty imposed.

At page 174, volume 5, Criminal Law Magazine, Mr. Thompson says: "Since the abolition of imprisonment for debt in the United States, the idea of those contempts which are termed remedial contempts has come to be the refusal to do something which a party is adjudged to do, and which it is in his power to do. Even in remedial contempts of the mildest character, there is, therefore, the essential idea of contumacy, willful disobedience of orders and decrees made in the administration of justice. This is an offense against the administration of justice and against society. It hence implies criminality. This

idea of criminality is so far a necessary ingredient of everything which is called a contempt that every contempt may be said to be a criminal contempt. It is necessary to consider this in order to understand what the courts mean when they say, as they do, without discriminating as to the kind of contempt, that contempts are crimes or misdemeanors, and that proceedings to punish contempts are criminal proceedings."

From the foregoing discussion, we think it apparent,—1. That the justice of the peace had statutory authority in this case to impose the fine of \$39.19 for the benefit of the plaintiff in the sequestration suit; 2. That said fine was also legally imposed as for a contempt of court, the officer having failed and refused to execute the process of the court: *Crow v. State*, 24 Tex. 12; 3. That in addition to the fine, the court had also the authority to order and commit the officer to imprisonment until the fine and costs were paid.

The only remaining question for our consideration is, whether the judgment, the order, and the commitment issued by the justice are valid and sufficient to authorize this imprisonment for said contempt.

It is well settled that, to justify the imprisonment of a party adjudged to be in contempt, an order or warrant of commitment of some sort is necessary: *Ex parte Burford*, 1 Cranch C. C. 456. "As to whether the order should contain a statement of the facts found in the proceedings prior to the commitment, the cases are in conflict. Thus in New York it is held that it must designate the particular misconduct of which the defendant is convicted. And in California it is laid down that it must state specially all the material facts on which the action of the court is predicated; and where the commitment is for refusing to obey an order of the court, it must set forth that it is in the power of the person to comply with the order. Again, it has been said that a warrant to commit for contempt issued by a limited authority should show that the contempt fell within the limits of that authority; but that when issued by a superior court of record, the adjudication of contempt may be general, and the particular circumstances need not be set out; that in such a case jurisdiction and regularity will be presumed. Again, it is held in New York that the process of commitment by a surrogate against a guardian for contempt need not recite all the facts necessary to confer jurisdiction. It should show on its face

that it issued in a proceeding wherein the surrogate had jurisdiction; what was the cause of commitment; what act or duty must be performed, and what expenses paid": Rapalje on Contempts, sec. 129.

"Either the order or judgment finding the defendant guilty of contempt in disobeying the command of the court, or the order of commitment for such contempt, must recite that it was in the defendant's power to perform the required act, or else the commitment will be void": Rapalje on Contempts, sec. 137; see also 5 Crim. Law Mag., p. 520, sec. 40; *Fischer v. Langbein*, 103 N. Y. 84.

Under these rules, with regard to what is necessary to be stated in the judgment and order or writ of commitment in such cases of constructive contempt as the one in hand, we must hold that an inspection both of the judgment and of the writ of commitment show them each to be wanting in the essentially requisite allegation that it was in the power of the defendant, Robertson, to perform the act required of him by the writ of sequestration issued to him for execution, to wit, that it was in his power to execute the same. Unless this matter sufficiently appears, it is beyond the jurisdiction of the court to render a judgment for such contempt, and, it being essential to the validity of the judgment, the judgment itself should recite the fact. Failing to recite this essential fact, the judgment is void.

As to the order or writ of commitment, it is open to the further objection that upon its face it shows the imposition of a fine as for a criminal contempt which, ostensibly, the court had no authority to inflict, and fails to recite all the facts necessary to confer jurisdiction upon the court to inflict punishment for a constructive contempt in the failure and refusal of the officer to obey the commands of the court.

Because the judgment finding the officer guilty of contempt, and the writ of commitment ordering his imprisonment are, each and both, void in law, the applicant, W. M. Robertson, is hereby released and discharged from further detention in custody on account of the same, and his discharge is ordered accordingly.

CONTEMPT—POWER OF COURTS TO PUNISH FOR: See monographic note to *Clark v. People*, 12 Am. Dec. 178-186; *State v. Doty*, 32 N. J. L. 403; 90 Am. Dec. 671, and note; *State v. Galloway*, 5 Col. 326; 98 Am. Dec. 404, and note; *Williamson's Case*, 26 Pa. St. 9; 67 Am. Dec. 374; *Ex parte Grace*, 12 Iowa, 206; 79 Am. Dec. 529; *Howard v. Durand*, 36 Ga. 346; 91 Am. D.

767; *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; *Middlebrook v. State*, 43 Conn. 257; 21 Am. Rep. 650; *Rhinchart v. Lance*, 43 N. J. L. 311; 39 Am. Rep. 592; *State v. Woodfin*, 5 Ired. 199; 42 Am. Dec. 161, and note; *Neel v. State*, 9 Ark. 259; *Ex parte Adams*, 25 Miss. 883; 59 Am. Dec. 234; *Republica v. Passmore*, 3 Yeates, 441; 2 Am. Dec. 388, and note. The power to punish for a violation of its orders or judgments is inherent in every court having common-law jurisdiction, without any express statutory authority: *Kregel v. Bartling*, 23 Neb. 848. But a court loses jurisdiction to punish for a contempt committed in its presence when it delays to take any proceedings in the matter for a period of fifty days after the alleged commission of the contempt: *In re Foote*, 76 Cal. 543.

CONTEMPT. — There are two kinds of contempt, direct and constructive; direct contempt is committed in the presence of the court while sitting judicially; constructive contempt is that which tends to obstruct and embarrass the court, though not committed in the court's presence: *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; *State v. Frew*, 24 W. Va. 416; 49 Am. Rep. 257. In a case of civil contempt, — as when a defendant in a civil action is ordered by the court to pay money to the plaintiff, and is committed until he shall have paid it, — the prisoner is in custody as under an execution: *In re Wilson*, 75 Cal. 580. A contempt is generally in the nature of a criminal offense, and the proceeding for its punishment is criminal in its character: *State v. Irwin*, 30 W. Va. 404.

BIRD v. STATE.

[27 TEXAS APPEALS, 635.]

CRIMINAL LAW. — ADULTERY, under the Texas statute (Penal Code, articles 333-337), may be committed in two ways: 1. By the parties living together and having carnal intercourse with each other; 2. By the parties having habitual carnal intercourse with each other without living together. To convict under the first way, it must be proved that the parties lived, dwelt, and resided together, and a single act of carnal intercourse is sufficient, if they so live. To convict under the second way, the proof must show that the carnal intercourse was habitual.

CRIMINAL LAW — ADULTERY. — "LIVING TOGETHER," as used in articles 333-337 of the Texas Penal Code defining adultery, means that the parties must reside together; that is, dwell and abide together in the same habitation as a common or joint residing-place.

CONVICTION for adultery. Defendant rented a house, furnished it, and supplied it with groceries, representing that he rented it for other persons. The house was then occupied by Ida Smith, defendant's co-defendant. Defendant did not live in the house, but it was proved that he frequently entered the house at night, and left the next day; was seen on the premises but partially dressed, and that he was a married man.

Graham and McMurray, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. Two modes of committing the crimes of adultery and fornication are prescribed by the Penal Code of this state: 1. By the parties living together and having carnal intercourse with each other; 2. By the parties having habitual carnal intercourse with each other without living together: Pen. Code, arts. 333-337. The articles cited became law upon the adoption of the revised code, and they changed materially the statutes then in force relating to said offenses, and the changes made rendered inapplicable some rules and principles announced in decisions made under the former statutes: *Collum v. State*, 10 Tex. App. 708.

In the case before us, the defendant stands convicted of adultery, committed in the first mode named in article 333, by living together with one Ida Smith, and having carnal intercourse with her. To support such conviction, it was essential that the state should prove, not only that the parties had carnal intercourse with each other, but also that they lived together. A "living together" is not defined by the code. These words are, therefore, "to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed": Pen. Code, art. 10. Guided by this rule of construction, we are of the opinion that the term "living together," as used in articles 333 and 337 of the Penal Code, means that the parties must dwell or reside together,—abide together in the same habitation as a common or joint residing-place. This interpretation of the term is more restricted than has been given to it in decisions made under the former statutes: *Swancoat v. State*, 4 Tex. App. 105; *Parks v. State*, 4 Id. 134. But the former statutes prescribed but one mode of committing adultery, which was by the parties living together and cohabiting with each other. Carnal intercourse with each other, however frequent, did not constitute the crime, unless the parties in some sort of way lived together. But as the law now is, habitual carnal intercourse, without living together, is adultery. It is plain to our minds, therefore, that in providing the two different modes of committing adultery, it was intended that the words "living together" should mean what we have above construed them to mean, and that, where the parties did not actually live, that is, dwell, reside together, they would be still guilty of adultery by having habitual carnal intercourse with each other. But unless such intercourse was habitual, the parties not living together,

adultery would not be committed; while, on the other hand, a single act of carnal intercourse, if the parties at the time lived together, would, under the law now in force, constitute the crime.

In this case, we do not think the evidence supports the conviction, in that it does not show that the parties lived together, within the meaning of that term. If the defendant had been prosecuted for having habitual carnal intercourse with the woman, without living with her, the evidence would sustain a conviction, but he was not prosecuted or convicted for that kind of adultery, and we cannot sustain his conviction for committing the crime in one mode, when the evidence shows that he did not commit it in that mode, although he may have committed it in the other mode.

With respect to the rulings and charge of the court, we have found no error. Because the conviction is not supported by the evidence, the judgment is reversed, and the cause is remanded.

ADULTERY — WHAT IS, AND WHAT CONSTITUTES THE CRIME: See monographic note to *Commonwealth v. Call*, 32 Am. Dec. 289, 290; *Smith v. Commonwealth*, 54 Pa. St. 209; 93 Am. Dec. 686; *State v. Weatherby*, 43 Me. 258; 69 Am. Dec. 59; *Helfrich v. Commonwealth*, 33 Pa. St. 68; 75 Am. Dec. 579. Conviction for unlawful cohabitation in adultery cannot be sustained, where the evidence simply shows that the convicted parties lived together under the same roof as master and servant, and that there were occasional instances of illicit intercourse between them: *Carotti v. State*, 42 Miss. 334; 97 Am. Dec. 465, and note; note to *Badiford v. State*, *ante*, p. 20.

McDADE v. STATE.

[27 TEXAS APPEALS, 641.]

CRIMINAL LAW — MURDER — MANSLAUGHTER — THREATS. — The mere fact of being encountered or overtaken in the street or highway by one who has threatened another's life some months before, without any act indicative of an intention of then carrying such threats into execution, is not adequate cause to excite such anger, rage, sudden resentment, or terror as renders the mind incapable of cool reflection, so as to reduce a killing from murder to manslaughter; even if an agreement existed between the accused and deceased that the latter would not carry his rifle in his hands, or otherwise than attached to his saddle in a scabbard, or in his buggy, and that any other mode of carrying the gun might be considered a declaration of hostility, and it is shown that when the deceased was killed he was sitting on his horse, with the gun across his lap, in violation of his contract, but that he made no hostile demonstration with it, even after the attack was made on him.

CRIMINAL LAW — INSTRUCTION — REASONABLE DOUBT. — An instruction that "defendant is presumed to be innocent until his guilt is established by the evidence, to the satisfaction of the jury, beyond a reasonable doubt," is a substantial compliance with the statute, though the word "legal" is omitted before the word "evidence."

CRIMINAL LAW — EVIDENCE. — Where a defendant elicits testimony from his witness on direct examination adverse to himself, he must abide the consequences, and cannot complain that it is given, with other evidence, to the jury for their consideration.

JURY AND JURORS — AFFIDAVIT TO IMPRACH VERDIOT. — An affidavit by a juror that the verdict was arrived at by unfair and illegal means, made after the rendition of the verdict, and contradicted by the affidavit of ten of his fellow-jurors, is not ground for a new trial.

Hutcheson, Carrington, and Sears, and Gustave Cook, for the appellant.

W. L. Davidson, assistant attorney-general, and Pinckney and Poole, for the state.

WHITE, P. J. This appeal is from a judgment of conviction for murder of the second degree, with the punishment assessed at imprisonment in the penitentiary for a term of eight years.

It is an undisputed, uncontroverted fact that this appellant and one Dick Springfield shot and killed the deceased, S. W. Allchin, with shot-guns and pistols, as alleged in the indictment. This appellant does not deny, but admits the fact, claiming that he was justifiable in so doing, or at most that his offense in so doing, under the facts developed on this trial, did not amount to murder, but was manslaughter. No issue of manslaughter was submitted in the charge of the learned judge on the trial below, and the omission of the charge in this regard is urgently insisted upon as serious, radical error.

A brief *résumé* of the facts is necessary in order to properly determine the merits of this objection to the charge. About a month before the day of this homicide, the deceased, Allchin, had killed one Chambers, a relative of this appellant, and a deputy sheriff of Waller County. Appellant and Springfield were also deputy sheriffs. Out of the killing of Chambers by Allchin, a bitter feud and hostility arose between the McDade, or sheriff's party, and Allchin, which became of so serious a character that mutual friends of the two parties interfered to settle it, and finally succeeded in patching up or arranging an agreement or truce between them. By this agreement or truce it was, amongst other things, stipulated on behalf of Allchin that he was not to go to Hempstead with his Winchester rifle in his hand, but was to carry it in his buggy, or holster or

scabbard on his saddle when he was upon horseback, and that to carry it in any other way was to be considered by the other party as a declaration of hostility. None of the McDades were to molest him in any way, and if either party heard of threats made by one against the other, or of acts against the agreement, they were to report it to mutual friends. A week or so before the killing, Allchin, on one or two occasions, was seen by the McDades carrying his Winchester in his hands on the streets of Hempstead, and the McDades complained of it as exciting their serious apprehension of danger. Allchin was told in the final conversation, by mutual friends, that again to carry his gun in his hands would excite apprehension in the McDades' minds, and would be to them a declaration of hostility, and he assented to the justice of this statement. Several ruptures of the agreement were shown on the part of Allchin, and these breaches of the contract were known to defendant. A few days before the killing, defendant received a written notice from Harvey that Allchin would be in town on Saturday, with his friends, to kill defendant; threats of death were communicated to defendant. The evidence shows threats upon the part of Allchin against defendant, some communicated and others not. On Saturday Allchin came to town on horseback, and was seen at several points in and upon the streets and at the depot. He had his Winchester rifle with him, and was handling it upon the depot platform. There was a public park or square in the center of the town, surrounded on the north and west by business houses. Haveman's corner or business house was the corner house on the south of the west block, which fronted this square. On the northwest corner of this square was Wheeler's saloon. Some time before the killing Allchin was on horseback at or near Haveman's corner, talking to some friends on the sidewalk. His horse's head was north, or up the street, in the direction of Wheeler's saloon. He had his back to Haveman's corner, and his leg was thrown over the horn of his saddle, and his Winchester was lying across his lap, half-cocked, which was the usual way he carried it for safety from accidental explosion. He could be seen from Wheeler's saloon. A short time—a few moments—before the shooting, Springfield and appellant were near Wheeler's saloon, and one of them was heard to say to the other: "That's him," or "Is not that him down yonder now?" They went into the saloon, took a drink, and were next seen to emerge from the rear end of said saloon, in

an alley between it and the adjoining building, with double-barreled shot-guns in their hands. They proceeded diagonally across the street into the alley in rear of the building on the west side of the square; went down this alley rapidly a distance of six or seven hundred feet from Wheeler's to the street west of Haveman's, and then up said street to the front or southeast corner of Haveman's, which brought them to the sidewalk within a few feet of where Allchin was sitting on his horse, as above described, with his back to them. Just as they got upon the sidewalk, some one exclaimed, "Look out!" and the shooting commenced, and was kept up by Springfield and defendant until deceased fell from his horse, when they went up to the struggling and almost inanimate body and finished the work by other shots from gun and pistol into his head and face, saying, when they had finished by shooting his face off entirely: "That's the way we do men who murder men on the streets." Allchin did not fire a single shot, nor does it appear that he had time to do so, or even time to make an effort to do so. It does not appear that he even saw the parties, or could have seen them from the time they left Wheeler's saloon until they fired upon him.

Evidence was adduced by appellant tending to show that he and Springfield went from Wheeler's saloon to Haveman's corner in the manner they did, and armed as they were, for the purpose of arresting a fugitive desperado and murderer from Montgomery County, for whom they had a warrant of arrest, and who was reported to them as having been seen at or near Haveman's corner just before they armed themselves, and started by the alley-way from Wheeler's, and that their seeing Allchin when they reached the front of the Haveman corner upon the sidewalk was sudden, and wholly unexpected.

Upon the above-recited state of facts, it is strenuously insisted that on account of the previous threats and acts of Allchin, the fact that he was thus suddenly seen carrying his gun in violation of his agreement, and which in itself was by said agreement a declaration of hostility, the appearances of danger to appellant and Springfield were such as were calculated to arouse a degree of anger, rage, sudden resentment, or terror in persons of ordinary temper sufficient to render their minds incapable of cool reflection; and that having acted upon such appearances, and from such impulses and passion, the issue of manslaughter was clearly raised, and should have been given

in charge to the jury as a necessary part of the law of the case.

Suppose, in the light of the most potent, if not overwhelming, facts to the contrary, we concede, for the argument's sake, that, as appellant contends, the coming upon Allchin by appellant and Springfield was sudden and unexpected, and without premeditation or intention, could his mere presence, and his presence with his back to them at that, unaccompanied by a single hostile word or deed, save the single fact that he had his gun across his lap, have aroused in the mind of a person of ordinary temper any of the emotions of the mind calculated to render it incapable of cool reflection? But it is said his having his gun in his lap, and not in his scabbard, was, according to his own solemn agreement and contract, an overt act of hostility, as much so as if it were directly drawn and presented upon them. If such had been the spirit and intent of the agreement as between the parties, the law could not afford to tolerate, much less recognize, a doctrine so variant from and at war with every principle it maintains for the welfare of society and the protection of human life, and sanction or mitigate the taking of human life under such pretext. Because it was so "nominated in the bond" could neither justify nor mitigate or excuse it, if in contravention of the law. The law cannot and will not permit men to kill each other with impunity, notwithstanding they may have bound themselves to that effect with each other by the most solemn obligations.

It was held at one time in Kentucky, "that if a man feels sure that his life is in continual danger, and that to take the life of his menacing enemy is his only security, he may kill that enemy whenever and wherever he gives him a chance, and there is no sign of relenting": *Carico v. Commonwealth* and *Phillips v. Commonwealth*, Horrigan and Thompson on Self-defense, 383-389. But this doctrine has been overruled even in that state (*Bohannon v. Commonwealth*, Id. 395), and has never, so far as we are aware, been recognized as the law elsewhere. Such a doctrine would make the bare presence of an enemy an overt act justifying his destruction.

But it is said Allchin was not only guilty of a "declaration of hostility" by the manner in which he was carrying his gun, but in addition thereto he had made threats that he would kill the McDades, or any of them he might get an opportunity to kill, on that very day. In *Johnson v. State*, 27

Tex. 753, Judge Moore says: "In no case under the provisions of the code or out of it, if we were permitted to look elsewhere to ascertain the law upon the subject, can it be held that mere threats, unaccompanied by some demonstration from which the accused may reasonably infer the intention of their execution by the deceased, either justify such homicide or reduce it from murder to manslaughter. . . . The doctrine contended for must, therefore, be narrowed down to this simple proposition: that the mere fact of being encountered or overtaken in the street or public highway by one who has threatened another's life some months before, without any act whatever indicative of an intention of then carrying such threats into execution, is 'adequate cause' to excite such 'anger, rage, sudden resentment, or terror' as renders the mind 'incapable of cool reflection.' The bare statement of this proposition is sufficient for its refutation. If such was the case, the language of passion, forgotten with the occasion which gave it utterance,—the idle talk of the silly or the inebriate,—must be paid for with the penalty of life. A full floodgate would be given to the most wicked passions, and murder, fearful as it already is, in a tenfold greater degree would stalk through the land, clothed in the panoply of law": Pen. Code, art. 594; Willson's Crim. Stats., sec. 1009.

Under our statute with regard to threats as evidence (Pen. Code, art. 608), "it is not practicable to fix on what the act manifesting the intention of the deceased to execute his threats shall be, but it must be some act reasonably calculated to induce the belief that the threatened attack has then commenced to be then executed, and not a mere act of preparation to execute the threats at some other period of time, either speedy or remote": *Irwin v. State*, 43 Tex. 236; *Lynch v. State*, 24 Tex. App. 350; 5 Am. St. Rep. 888; *Brooks v. State*, 24 Tex. App. 274; Willson's Crim. Stats., sec. 1053.

We are of opinion, for the reasons above given, that the court did not err in declining to submit in the charge to the jury the issue of manslaughter as an issue in this case. And for the reasons above given, we are further of opinion that the court did not err in refusing to give the following special requested instruction, asked in behalf of defendant, viz.: "If you believe, from the evidence, that the defendant and the deceased, either in person or by parties representing them, made an agreement, the object of which was to prevent further hostilities and to preserve the peace, and that they agreed on cer-

tain conditions which were to be observed by both parties, the violation of which was to nullify the agreement and give notice that it was terminated, and if you further believe that after such agreement was made, if any ever was, that the deceased, Allchin, in violation of his agreement, if any, did any act or acts in violation thereof, and that the defendant knew, or heard of the same, and honestly believed that the same was a declaration of hostility, and that he was in danger of death or serious bodily harm; and if you further believe that, after the agreement, if any, was broken by the deceased, the defendant saw deceased in the act of violating his agreement, and that, so seeing him, defendant believed himself in immediate danger of death or serious bodily harm,—then defendant had a right to act on the appearances of danger to himself, if any, and though defendant may have been mistaken in his belief of immediate danger of death or bodily harm, yet if he honestly believed, and had reason to believe, that he was in such danger, and honestly acting on such appearances he killed Allchin, he would be guilty of no offense, and you will find him not guilty.”

“If the jury believe, from the evidence, that there was a contract between the deceased and the defendants, by the terms of which he was not to carry his Winchester in his hands, or otherwise than attached to his saddle in a scabbard, or in his buggy, and if they further believe that the said contract was made, and that deceased failed to conform to the same, and that complaint was made to the parties negotiating between the deceased and the defendants concerning such contract and breach thereof, and that said parties notified the deceased that again to carry his weapon in a manner not provided in said contract would be regarded as a breach thereof and a hostile demonstration, but that such was the understanding between the parties; and if the jury believe that at the time of the killing the deceased with such knowledge on his part, and the defendants with such understanding on their part, found the deceased carrying his weapon in an attitude which was in violation of the contract, what the parties regarded as a hostile demonstration, and came suddenly upon him, and thereupon shot and killed the deceased,—then the defendants are not, in law, guilty, and you will acquit by your verdict.”

The charge of the court on self-defense was, in our opinion, sufficient and pertinent to the facts in evidence, if indeed the issue of self-defense could in any manner be said to have been

legitimately raised by the facts: Willson's Crim. Stats., secs. 969, 970, 978. The evidence totally fails to show any real or apparent danger at the time appellant and Springfield opened fire on Allchin. He was sitting on his horse with his back to them, his gun across his lap, talking to some party or parties on the sidewalk; he did not, and could not, have seen them, and if he grasped his gun at all it was after the appearance of appellant and Springfield upon the sidewalk with their guns had occasioned some one to exclaim "Look out"; and then, before he could have raised his gun from his lap, he was fired upon by these parties, and his gun was never in a condition to be used upon them after they commenced the attack.

Upon "reasonable doubt," the court instructed the jury that "the defendant is presumed to be innocent until his guilt is established by the evidence, to the satisfaction of the jury, beyond a reasonable doubt." This was specially excepted to, because of the omission of the word "legal," as used in the statute, before the word "evidence": Code Crim. Proc., art. 727. Whilst it has been uniformly held and recommended by the court that reasonable doubt should be charged in the exact language of the statute (*Bramlette v. State*, 21 Tex. App. 611; 57 Am. Rep. 622), we have never held that a substantial compliance with the terms of the statute was not sufficient. Willson's Crim. Stats., 1071, 2426, 2427. It is not perceived how the omission of the word "legal" before the word "evidence" could in any manner have misled the jury, or have proved prejudicial in any manner to the rights of the accused.

In the seventh assignment of error, it is complained that "the court failed to instruct the jury that the declaration of Allchin to Felker that threats had been made against him by defendant was not any evidence that such threats were made, and that they should not consider such statement as a part of the evidence for that purpose, when it was expressly requested so to charge by defendant." This evidence was drawn out by defendant upon the direct examination of his witness Felker, and neither the prosecution nor the court was responsible for it. If the defendant elicits testimony adverse to himself, he must abide the consequences: *Speights v. State*, 1 Tex. App. 551; *Moore v. State*, 6 Id. 563.

One of the grounds of motion for new trial was that the verdict of the jury was arrived at by unfair and illegal means, and was in fact decided by lot, or means equivalent thereto. A juror made affidavit to this effect. But in addition to the

fact that no complaint or objection was heard from him when the jury was polled after the verdict was returned into court, he is flatly and positively contradicted upon the point relied upon by the affidavits of ten of his fellow-jurors, filed by the state in answer to this ground of the motion. It was not error to overrule the motion based upon this objection to the verdict.

We have examined and discussed all the grounds mainly relied upon by able counsel for appellant, and besides, have read, re-read, and maturely considered this voluminous record with a view of seeing whether in the conduct of the trial any proceedings were allowed likely to impair the fairness and impartiality of the trial, and impeach the legality of the conviction; and we are constrained to say we have found none. The trial has been fair and impartial, so far as we have been able to judge of it from the record, and, considered in the light of the record, we think appellant has every reason to congratulate himself upon the mildness of the punishment awarded him. The judgment is affirmed.

PRIOR THREATS. — Evidence that deceased was a turbulent and quarrelsome man, on a trial for murder, is inadmissible by way of justification or excuse, even though such deceased person threatened the prisoner's life, where it is shown that the prisoner sought him out and shot him, without any attempt upon his part to execute his threats: *Pritchett v. State*, 22 Ala. 39; 58 Am. Dec. 250.

WITNESSES. — A party asking a witness a question cannot object to his answer, if responsive to the question: *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666; nor can a party attack the credibility of his own witness by evidence of general reputation: *Olmstead v. Winsted Bank*, 32 Conn. 278; 86 Am. Dec. 260.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

[IN BANK.]
PEOPLE v. BENTLEY.

[77 CALIFORNIA, 7.]

CRIMINAL LAW — CONVICTION OF ASSAULT WITH DEADLY WEAPON IS NOT BAR TO PROSECUTION FOR ATTEMPT TO COMMIT ROBBERY. — Conviction of an assault with a deadly weapon, under an information charging an assault with intent to commit murder, is not a bar to a subsequent prosecution for an attempt to commit robbery, although both offenses relate to the same transaction, and are so closely connected in point of time that it is impossible to separate the evidence relating to them.

CRIMINAL LAW — EVIDENCE TO SHOW CONSPIRACY. — Evidence of the acts and declarations of an alleged co-conspirator before the commission of the crime, and tending to show the probability of an understanding between him and the defendant, is admissible to prove the conspiracy, in a prosecution for an attempt to commit robbery.

WITNESSES — IMPRACHMENT OF DEFENDANT BY EVIDENCE OF HIS GENERAL REPUTATION. — Defendant in a criminal case who has been a witness in his own behalf may be impeached by evidence as to his general reputation.

PROSECUTION for an attempt to commit robbery. According to the testimony of one Moore, the prosecuting witness, he and one Baker, on the evening of May 3, 1887, were desirous of going from Tulare to a certain ranch in the direction of Visalia. One Ward, who was speaking of going to Visalia, agreed to take Moore and Baker with him in his buggy to the ranch. On reaching a point on the road towards Visalia, where the road to the ranch diverged, Ward made some objections to going to the ranch, affecting to believe that it was farther than had been represented, and it was finally agreed that the par-

ties should go to Visalia direct. On the way, after passing the forks of the road, Ward stopped at a house, and, leaving Moore and Baker in the buggy, entered and remained some ten minutes. The defendant and one Ridgway, arrested with him, were stopping at this house. After leaving the house, Ward turned from the road, and affected to be lost. He told his passengers to go to some trees, and he would drive on to see, and would return shortly. Moore and Baker walked to the trees, where they were met by two men, who, presenting pistols, commanded them to hold up their hands and give up their money. This assault occurred about two o'clock, A. M. Moore recognized Ridgway, and swore that in size and general appearance the other man resembled the defendant. It was objected that this evidence of the acts and declarations of Ward was inadmissible. The defendant was previously tried and convicted of an assault with a deadly weapon, under an information charging an assault with intent to commit murder, and on appeal, the conviction was sustained in *People v. Bentley*, 75 Cal. 407.

W. A. Gray and Oregon Sanders, for the appellant.

George A. Johnson, attorney-general, for the respondent.

FOOTE, C. The defendant was tried and convicted of an attempt to commit robbery. From the judgment given in the premises, and an order refusing a new trial, he appeals. He contends that he has been formerly convicted of the same offense, which is alleged to be a bar to this prosecution. It was attempted in his behalf to introduce evidence to show that such was the fact, but it was ruled out by the trial court, and exception taken. The evidence offered tended to show that he had been convicted of an assault with a deadly weapon, under an information charging an assault with intent to commit murder. It is plain that the defendant had not formerly been convicted of an offense for which he could have been or was tried and convicted on the information charging the offense of which he here stands convicted. "It is believed that no well-considered case can be found where a putting in jeopardy for one act," or a conviction for one act, "was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it was impossible to separate the evidence relating to them": *Teat v. State*, 53 Miss. 439; 24 Am. Rep. 708. According to the testimony in this case, the first thing

done by the defendant and his confederate was an attempt to intimidate and rob; the next was to attack with a deadly weapon. It cannot be the law that a man, having assaulted another with a deadly weapon, and having also attempted before that to rob him, can escape punishment for the attempt to rob because of conviction for assault with a deadly weapon. If the offenses do not possess the same elements, although both relate to the same transaction, it would seem that both may be punished. This view of the law seems to have been taken by the supreme court of this state in the case of *People v. Majors*, 65 Cal. 138, where many authorities bearing upon the matter in hand are cited and discussed. The offense of which the defendant was first convicted was an effort to injure the person of the prosecutor with a deadly weapon; that of which he was last convicted was an attempt to take away the goods of the prosecutor from his person by intimidation or violence. The essential elements of the two offenses are not the same.

The admissibility of the evidence of Moore, a witness for the prosecution, to prove a conspiracy to commit a felony, which was objected to by the defendant, but allowed by the court to go to the jury, has been determined heretofore against the defendant's contention in the case of *People v. Bentley*, 75 Cal. 407, where the facts surrounding the transaction are fully stated.

The question asked Evans, a witness, whether George Sevier lived in the same town with the defendant at the time of the alleged attempt to commit robbery, was immaterial. It was not shown, or attempted to be shown, that Sevier was anywhere in the immediate vicinity of Ridgway, the accomplice of the defendant, on the night when the offense was charged to have been committed, or that by any possibility Sevier might have been the culprit instead of the defendant.

The testimony of R. P. Grant as to the character of the defendant for truth, or the contrary, was admissible in impeachment of the defendant's testimony. The witness evidently knew the general reputation of the defendant in that regard.

The defendant emphatically denied all complicity or knowledge of the offense charged against him, when he testified in his own behalf. The cross-examination to which he was subjected was fairly directed to the rebuttal of the entire innocence which he thus proclaimed, and was legitimate and proper. There does not appear to be any merit in the defend-

ant's points made upon appeal, and we advise that the judgment and order be affirmed.

BELCHER, C. C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

FORMER ACQUITTAL OR CONVICTION AS A DEFENSE. — Where defendant and another, with a common design, fired two simultaneous shots, which killed G. and W., the killing of each was a distinct crime, and an acquittal of the defendant for the murder of one was no bar to a trial upon an indictment for the murder of the other, although the evidence in each case was the same: *Teat v. State*, 53 Miss. 439; 24 Am. Rep. 708. Neither an acquittal upon an indictment for larceny, nor a conviction upon an indictment for receiving stolen goods, is a bar to a subsequent indictment, charging the same respondent with being an accessory before the fact to the stealing of the same goods: *State v. Larkin*, 49 N. H. 36; 6 Am. Rep. 456. To an indictment for an attempt to produce a miscarriage, an acquittal on an indictment for the murder of an unborn child by an attempt to produce a miscarriage is no bar: *State v. Elder*, 65 Ind. 282; 32 Am. Rep. 69. Acquittal as principal in a murder is no bar to an indictment as accessory before the fact in the same: *State v. Bussell*, 58 N. H. 257; 42 Am. Rep. 586. An acquittal of arson of a mill is a bar to a subsequent prosecution for arson of account-books at the same time: *State v. Colgate*, 31 Kan. 511; 47 Am. Rep. 507. A former conviction of assault and battery is no bar to an indictment for manslaughter, where the injuries resulted in death after the former conviction: *State v. Littlefield*, 70 Me. 452; 35 Am. Rep. 335; *Curtis v. State*, 22 Tex. App. 227; 58 Am. Rep. 635; *Johnson v. State*, 19 Tex. App. 453; 53 Am. Rep. 385. A conviction of robbery is a bar to a subsequent indictment founded on the same transaction for assault with intent to murder: *Wilcox v. State*, 6 Lea, 571; 40 Am. Rep. 53. Where two are murdered by the same act, conviction or acquittal as to one does not bar a prosecution as to the other: *People v. Majors*, 65 Cal. 138; 52 Am. Rep. 295; and cases therein cited and commented upon. Where the goods of two different owners were stolen at the same time, an acquittal on an indictment for stealing the goods of one will not bar an indictment for stealing the goods of the other: *Alexander v. State*, 21 Tex. App. 406; 57 Am. Rep. 617. Acquittal of larceny is no defense to an indictment for procuring goods by false pretenses: *Dominick v. State*, 40 Ala. 680; 91 Am. Dec. 496. Acquittal for adultery is not a bar to a prosecution for fornication; nor is an acquittal for bigamy a bar to a prosecution for adultery; nor an acquittal for larceny a bar to a prosecution for obtaining money under false pretenses; nor an acquittal for rape a bar to a prosecution for an assault to commit rape; nor an acquittal for forgery a bar to a prosecution for uttering a forged instrument; nor an acquittal of larceny a bar to a prosecution for receiving stolen goods: Extended note to *Roberts v. State*, 58 Am. Dec. 538-549; but an acquittal of murder bars a prosecution for manslaughter; and an acquittal of robbery bars a prosecution for larceny: *Id.*; but an acquittal of burglary may, or may not, bar a prosecution for larceny, depending upon the circumstances of each particular case; and so also an acquittal or conviction under liquor laws may, or may not, bar a second prosecution: *Id.* Several offenses may be committed by one unlawful act which operates on several objects; and each offense thus committed may be

presented separately. But when such act affects only one object, and is charged as constituting several offenses, each of which is a degree, or an essential element of the other, there can be but one prosecution: *For v. State*, 50 Ark. 528. A new trial for one convicted of manslaughter is not a bar to conviction for murder under the same indictment: *Commonwealth v. Arnold*, 13 Ky. 1; 4 Am. St. Rep. 114, and note 117. A conviction or acquittal in one offense is a bar to a prosecution in another, where the offense or trial is a necessary element in and constitutes an essential part of the other: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note 62.

CONSPIRACY, WHAT ACTS ARE ADMISSIBLE TO PROVE THE CRIME: *McLure v. People*, 126 Ill. 150; 9 Am. St. Rep. 547, and note 574; *Egan v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note. As to what declarations of defendants are admissible in a prosecution for conspiracy, see note to *Brayford v. Sawyer*, 80 Am. Dec. 550. To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common design; and when the conspiracy has ended, or the crime conspired has been consummated, the admission of one, in the absence of the other conspirators, affects only him who makes it: *State v. Johnson*, 40 Kan. 264.

IMPEACHMENT OF A WITNESS TESTIFYING ON HIS OWN BEHALF. — A prisoner testifying on his own behalf is subject to impeachment like other witnesses: *State v. Clinton*, 67 Mo. 380; 29 Am. Rep. 564. Where defendant denied that at a certain time and place he had stated that he was innocent, it was not competent to contradict him by showing he had made such a statement; because the inquiry was collateral, and the plaintiff was bound by the aver: *Hinton v. Prichard*, 98 N. C. 355.

[IN BANK.]

MORITZ v. LAVELLE.

[77 CALIFORNIA, 12.]

MINING CLAIM — VERBAL AGREEMENT TO LOCATE — STATUTE OF FRANCHISES

— **TRUST.** — Agreement to locate a mining claim for the joint benefit of the parties need not be in writing under the statute of franchises; and if, in pursuance of a verbal agreement to that effect, one of the parties locates the claim in his own name, he will hold the legal title to the interest of the other in trust for him.

MINING CLAIM — ACTION TO ENFORCE TRUST — CITIZENSHIP NEED NOT BE ALLEGED. — Plaintiff need not allege citizenship in his complaint, in an action to enforce a trust in a mining claim located by the defendant in his own name for the joint benefit of both parties.

FRANCHISE — ALLEGATION OF PERFORMANCE OF CONDITIONS ON PART OF PLAINTIFF. — Performance of conditions on the part of the plaintiff is sufficiently alleged in an action to enforce a trust in a mining claim under a verbal agreement between the parties, where the complaint states "that plaintiff has performed all and singular his agreements and covenants with defendant."

ACTION TO ENFORCE A TRUST IN A MINING CLAIM, AND TO COMPEL THE DEFENDANT TO EXECUTE AND DELIVER TO THE PLAINTIFF A DEED TO

an undivided one-half interest in the mine. The opinion states the facts.

W. A. Gray and Oregon Sanders, for the appellant.

W. B. Wallace, for the respondent.

PATERSON, J. The plaintiff and defendant entered into a verbal agreement to occupy and relocate a mine in Tulare County for their joint use and benefit. The plaintiff promised to pay all the expenses of the defendant, and furnish him with an outfit necessary to make the trip from Calaveras County to Tulare County, and to make the necessary examination of the mine; to pay the defendant's board for a certain time, and furnish him with provisions, clothing, and blankets. It was agreed that if the mine had been abandoned, the plaintiff should join the defendant at the mine, and assist in working the same. Pursuant to the agreement, the plaintiff furnished the defendant with all he had promised to furnish him. The defendant visited the mine, found that it was abandoned, notified the plaintiff of the fact, and the plaintiff joined him thereafter at the mine. The parties staked off the mine, erected the necessary monuments, completed the relocation of the mine by placing notices of relocation thereon, as required by law. These notices were signed by the defendant alone as locator, and by plaintiff as a witness, with the express oral agreement between them that, in consideration of the agreement which we have referred to, the defendant would transfer and deed to the plaintiff the undivided one-half interest in and to the mine. The parties thereafter commenced working the mine, and the plaintiff demanded a transfer to him of the undivided one-half interest which the defendant had promised to convey. The defendant refused to make a conveyance of any interest, and denied that plaintiff owned any interest therein, and forcibly expelled him from the mine. The court below gave judgment for the plaintiff as prayed for, namely, that defendant execute and deliver to the plaintiff a deed transferring the undivided one-half interest in and to the mine.

It is claimed that there having been no agreement in writing, and no such part performance as will take the case out of the statute of frauds, the contract cannot be enforced. But the statute of frauds has no application in cases of this kind: In *Gore v. McBrayer*, 18 Cal. 583, *Gore*, *McBrayer*, and others entered into an oral agreement to prospect for quartz.

The court there held that the statute of frauds, which requires an instrument in writing to create an interest in land, does not apply to the taking up of mining claims. In *Settembre v. Putnam*, 30 Cal. 490, it was held that where mining partners, under a verbal agreement, claim and develop a lode upon the land of another, and authorize one of their number to buy the claim for the benefit of all, and he procures a deed in his own name, he holds the legal title to the interest of his partners in trust for them. See also *Sandfoss v. Jones*, 35 Cal. 487; *Hirbour v. Reeding*, 3 Mont. 13; *Murley v. Ennis*, 2 Col. 300; *Welland v. Huber*, 8 Nev. 203.

It was not necessary for the plaintiff to allege citizenship in his complaint: *Thompson v. Spray*, 72 Cal. 528.

The complaint alleges "that plaintiff has performed all and singular his agreements and covenants with defendant." This allegation is sufficient, we think, as to the performance of conditions on his part: *California Steam Nav. Co. v. Wright*, 6 Cal. 258; 55 Am. Dec. 511.

The demurrer to the complaint, therefore, was properly overruled, and the plaintiff was entitled to judgment.

Judgment affirmed.

PLEADING. — General allegation of performance by plaintiff of conditions of a contract is sufficient, under the California statutes: *California Steam Nav. Co. v. Wright*, 6 Cal. 259; 65 Am. Dec. 511.

PLEADING — COMPLAINT. — The complaint in an action to quiet title to a mining claim which does not show on its face that it is brought under section 2325 of the United States Revised Statutes is not defective in its failing to allege that the plaintiff is a citizen of the United States: *Thompson v. Spray*, 72 Cal. 528.

[IN BANK.]

WALLACE v. BENTLEY.

[77 CALIFORNIA, 19.]

AGENCY — CONTRACT — PERSONAL LIABILITY OF AGENT. — Agent is not liable as a principal on a contract signed by him without authority, unless the contract contains apt words to charge him personally; and if he is not liable on the contract, he is only liable in an action to recover money paid or work or labor performed under the contract, or for special damages sustained by reason of the wrong in assuming to act without authority.

AGENCY — FALSE REPRESENTATIONS BY AGENT OF AUTHORITY — SPECIAL DAMAGES. — Agent is not liable for special damages by reason of false representations of authority to sell certain property, on account of which the plaintiff failed to negotiate with the owner, or with his authorized agent, and thus failed to obtain the property.

ACTION to recover damages by reason of the false and fraudulent representations of authority by defendants. The facts are stated in the opinion.

Byron Waters and William G. Webb, for the appellant.

Curtis, Otis, and Connor, for the respondents.

SHARPSTEIN, J. This appeal is from a judgment rendered in favor of the defendants, after sustaining their demurrer to the complaint of the plaintiff, and his failure to amend within the time granted for that purpose. The only question which we have to determine is, Does the complaint state facts sufficient to constitute a cause of action? That is the sole ground of the demurrer.

The complaint states that on the eighteenth day of March, 1887, one Swan Carlson was the owner of a certain tract of land in San Bernardino County, together with ten shares of stock of the Redlands Water Company, and that on that day the defendants represented to the plaintiff that they were the agents of said owner, authorized and empowered to sell said property for the sum of three thousand dollars, for which sum said owner was then offering to sell said property. Plaintiff was willing and desirous of purchasing said property at that price, and relying on the representations of the defendants, and having no knowledge of the truth or falsity of such representations, plaintiff accepted the offer of defendants, and paid them one hundred dollars as part of the purchase price of said property; at the same time taking from them an instrument in writing, of which the following is a copy:—

“SAN BERNARDINO, CAL., March 18, 1887.

“Received from J. C. Wallace the sum of one hundred dollars as first payment upon five acres in lot 8, block H, in Redlands, the purchase price of which is three thousand dollars, payable as follows: One third cash, less the above-mentioned one hundred dollars; the balance to be paid on or before two years, with interest at ten per cent per annum, on condition that an acceptable title and abstract be furnished.

“BENTLEY AND JEFFREY, Agents for S. Carlson.”

The plaintiff, relying on the truth of the representations made by the defendants, did not seek to purchase said property from any other agents, nor from the owner, though for two weeks afterward said property could have been bought for said above-mentioned sum from a duly authorized agent of said owner.

It is further alleged that all such representations of the defendants were false, and that they had no authority whatever from the owner of said property to sell or negotiate a sale of the same, or any part thereof. Plaintiff, for the first time, on April 8, 1887, discovered that such representations were false. That within three weeks after the eighteenth day of March, 1887, said property had become of the value of four thousand dollars, and is still of that value. That the owner refused to ratify the contract made between defendants and plaintiff, and about the first of April sold said property to some person other than plaintiff for the sum of four thousand dollars. Plaintiff has at all times been ready and willing to comply with his part of the said contract made with defendants. That by reason of the false and fraudulent representations of defendants, plaintiff was prevented from purchasing said property, to his damage one thousand dollars, for which sum he demands judgment against defendants.

The theory of the pleader evidently was, that upon the facts alleged the liability of the defendants is the same as that of the owner of the property would be if he had authorized the defendants to sell the property, and then after they had sold it he had sold and conveyed it to some one else. Had that been the case, he, and not the defendants, would have been liable for the damages claimed in this case. But the owner is not liable on the contract, because the defendants had no authority from him to make it. The defendants are not liable, unless the contract contains apt words to charge them personally: *Hall v. Crandall*, 29 Cal. 568; 89 Am. Dec. 64; *Lander v. Castro*, 43 Id. 497.

If not liable upon the contract because they did not undertake to contract on their own behalf, the plaintiff's remedy against the defendants "is an action to recover the money, if any has been paid them, or the value of the work or labor, if any has been performed for him under the supposed contract, or special damages resulting to the plaintiff by reason of the defendant's wrong in undertaking to act for another without authority": *Hall v. Crandall*, *supra*. This action is not for the recovery of any money paid by the plaintiff to the defendants. And the only attempt to allege facts entitling the plaintiff to special damages is, that by reason of the representations of the defendants he was prevented from purchasing the premises. But the facts alleged do not constitute prevention. The plaintiff had the same right after negotiating with the defendants

that he had before negotiating with them to negotiate with the owner of the premises, or any authorized agent of his, for the purchase of the property. Plaintiff's failure to do so was not a necessary consequence of the defendant's representation that they had authority to act for the owner. That constituted no legal obstacle to his doing so. The facts alleged are not, in our opinion, sufficient to constitute a cause of action on any ground upon which actions are maintainable against persons falsely representing themselves as agents for others. That an action is maintainable against one who obtains anything of value by such false representation, we do not doubt. But this action is not for the recovery of anything obtained by defendants from plaintiff, but for profits which he might have made if the person for whom the defendants had assumed to act had performed the agreement which defendants without authority made in his name. To so hold would be to hold that defendants were liable on the contract, which would be contrary to the doctrine of all the decisions on the subject in this state.

Judgment affirmed.

AGENCY. — A contract is void when not binding upon the principal for want of authority in the agent to make it, and not binding on the agent for want of apt words to charge him personally; and agents who execute contracts for others without authority, and without apt words to charge themselves personally, are not liable on such contracts as contracting parties: *Hall v. Crandall*, 29 Cal. 567; 89 Am. Dec. 64, and note; *Duncan v. Niles*, 32 Ill. 532; 83 Am. Dec. 293; and in such a case the remedy against the agent is for the wrong done in assuming to act without authority: *Duncan v. Niles*, *supra*; *Lander v. Castro*, 43 Cal. 501. An agent is liable personally on contracts which show an intention to bind himself personally: *Simonds v. Heard*, 23 Pick. 120; 34 Am. Dec. 41; *Davis v. Burnett*, 4 Jones, 71; 67 Am. Dec. 263. But the contract must contain apt words, to charge the agent as such: *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429.

AGENCY — FALSE REPRESENTATIONS. — One who, without authority, has assumed to act as the agent of another, and as such agent has entered into a contract in the name of the principal for the sale of the property of such assumed principal, cannot be held liable on the contract for damages for breach thereof: *Senter v. Monroe*, 77 Cal. 347.

[IN BANK.]

BULL v. COM.

[77 CALIFORNIA, 84.]

ACKNOWLEDGMENT OF MARRIED WOMAN TO DEED REFERRING TO ANOTHER INSTRUMENT — DUTY OF NOTARY. — Notary who takes the acknowledgment of a married woman to a deed which refers to another instrument not before him, for the conditions upon which the property is conveyed, is not required to make her acquainted with the contents of such instrument, but does his whole duty if he makes her acquainted with the contents of the deed.

MARRIED WOMAN DELIVERING DEED TO HUSBAND TO ENABLE HIM TO BORROW MONEY — EXTENT OF HUSBAND'S AUTHORITY. — Married woman who executes a deed of her property, and delivers it to her husband for the purpose of enabling him to borrow money from the grantee without limiting him to any particular amount, thereby authorizes her husband to deliver the deed to the grantee for such an amount as he may see fit.

PARTNER'S RIGHT TO SUE CO-PARTNER FOR MONEY LOANED WITHOUT SETTLEMENT OF PARTNERSHIP ACCOUNTS. — One partner may sue another for money loaned, without a settlement of the partnership accounts, although the borrower intended to put the money into the firm, and does put it into the firm. The loan is not a partnership transaction.

MORTGAGEE'S RIGHT TO FORECLOSE AS TO ONE OF SEVERAL PIECES OF PROPERTY MORTGAGED — WAIVER OF OMITTED SECURITY. — Mortgagee whose loan is secured by mortgage on several pieces of property may foreclose as to one of such pieces, thereby waiving his security upon the omitted portions, if he does not seek a personal judgment against the mortgagor.

SURETY IS NOT DISCHARGED BY CREDITOR'S FAILURE TO PRESENT HIS CLAIM against the estate of the principal debtor, under the laws of California.

MARRIED WOMAN WHO MORTGAGES HER SEPARATE PROPERTY TO SECURE LOAN TO HER HUSBAND IS SURETY, and not a principal debtor, notwithstanding her general interest as a wife in her husband's transactions.

RELEASE OF SURETY BY RELEASE OF PRINCIPAL DEBTOR IS NEW MATTER, and must be pleaded as such. Nor will the omission be supplied by the course of the parties at the trial, unless such course appears clearly and beyond all controversy.

PRESENTATION OF CLAIM AGAINST ESTATE OF HUSBAND, WHERE CLAIM IS SECURED BY MORTGAGE OF HOMESTEAD UPON WIFE'S SEPARATE PROPERTY. — Mortgagee need not present his claim against the husband's estate, in California, if he waives all demands against the estate, where the mortgage to secure the husband's debt is of a homestead upon the separate property of the wife.

ACTION to foreclose a mortgage. The opinion states the facts.

Wells, Van Dyke, and Lee, and William H. Sharp, for the appellant.

Bicknell and White, and Chapman and Hendrick, for the respondents.

HAYNE, C. Suit to foreclose a mortgage. The material facts are as follows:—

Charles L. Strong, John O. Earl, and Alpheus Bull agreed together to purchase and operate a certain mine. Each was to furnish one third of the capital, and be interested in that proportion. Strong had no money, and Bull agreed to advance his share, taking as security a mortgage upon a piece of real property of which Mrs. Strong was the owner, and upon which a homestead had been declared, and taking also the title to the mine in his own name as additional security. The mortgage was by a deed absolute in form, duly signed and acknowledged by the Strong's. The terms of the contract were in a separate paper signed by Bull only. The money was advanced by Bull as required from time to time, in accordance with the terms of his contract. After a time the mine proved a failure, and Strong died. The defendant Coe was appointed administrator of his estate, and gave notice to the creditors to present their claims. Bull did not present any claim against the estate, but commenced his action of foreclosure upon the property mortgaged by Mrs. Strong, under section 1500 of the Code of Civil Procedure. The court below gave judgment for the defendants, and the plaintiff appeals. The following are the only questions which, we think, require notice:—

1. It is contended that there was no proper acknowledgment of the deed by Mrs. Strong. The argument is, that this deed expressly declares that the property is conveyed "in trust, the conditions of which are stated in a separate instrument"; that it appears from the evidence that this separate instrument was not signed until the next day, and that therefore its contents could not have been explained to her; that where one contract refers to another, the two are considered as one; and that therefore she was not made acquainted by the notary with the contents of the instrument, as the law requires.

We are not prepared to say that the certificate of the notary can be contradicted in the absence of proper allegations of fraud. We express no opinion upon that point. But assuming in favor of respondent that the certificate can be so contradicted, we nevertheless do not think the point well taken. The statute requires that the notary shall certify that he

"made her acquainted with the contents of the instrument": Civ. Code, sec. 1191. What instrument? Manifestly the one which the married woman has signed, and which the notary has before him. It would be absurd to say that he is to explain the contents of a document which he has not before him, and knows nothing about. It is perfectly true that for certain purposes two instruments which refer to each other are considered as one. But this is merely a fiction of law which is not to be extended to a case like this. We think that the notary did his whole duty if he explained that the instrument was a deed of the property to the grantee named therein, subject to the conditions appearing in the document referred to, which conditions and document were not before him. Any other construction would not only be unwarranted by the language of the statute, but would be dangerous to the security of business transactions.

2. It is argued that Mrs. Strong never authorized the mortgage for so large a sum. She does not deny that she executed and acknowledged the deed. Nor does she deny that her husband had authority to deliver it. Her answer admits that the deed was given to secure advances to the amount of three thousand dollars, but denies that it was given for any other purpose. The husband, therefore, had authority to deliver the deed. Furthermore, he had authority to deliver it "in accordance with its terms and manifest purpose": *De Arnaz v. Escandon*, 59 Cal. 489. And by its terms it was a conveyance "in trust, the conditions of which are stated in a separate instrument in hands of the parties of the first part." If that separate instrument had been in the hands of the parties of the first part, there could be no doubt but that she would have been bound by it, whether she knew its contents or not. It was not, in fact, signed until the next day. Its terms appear to have been agreed upon by the husband and Bull. It is not pretended that there ever was any other instrument agreed upon or in the hands of the parties of the first part, or that there was not the most perfect good faith on the part of Bull. Nor is any imputation expressly made upon the good faith of the husband. There is no evidence that he was limited to any particular amount. Mrs. Strong does not say that she so limited him. She says: "I never pledged the ranch myself for any such amount. I was never informed that any one else had until I was writing these letters for information." This is not inconsistent with the fact that she put the deed in

the hands of her husband, to be used by him as he thought best, or without inquiry as to what was to be done with it. Under the circumstances, we think that Strong was the ostensible agent of his wife.

3. It is contended that the action cannot be maintained because there was no settlement of the partnership accounts. The court finds that "the entire claim of plaintiff, whatever may be its amount or the balance due, grows out of the purchase and working of the said mine by the said Earl, Bull, and Strong, as mining partners, and not otherwise, and no accounting was ever had between the partners during the lifetime of the said Strong, nor any balance struck between them." In other words, the court found that the loan by Bull to Strong was a partnership transaction. So far as this involves a conclusion of law, the conclusion is erroneous; and so far as it is a finding of fact, it is not sustained by the evidence.

The uncontradicted evidence shows that the transaction as to the loan was entirely between Strong and Bull. Earl had nothing to do with it. Strong had obtained information concerning the mine, and he came to Earl and Bull to get them to go in with him. He had no money to pay for his share, and he borrowed it from Bull, giving the mortgage above mentioned as security. The character of the transaction is not changed by the fact that the money was not paid down at once, but was advanced by Bull as required. The mortgage was to cover future advances, and the transaction was purely and simply a loan from Bull to Strong.

It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions, in the absence of a settlement of the accounts. But by the terms of this rule it does not apply where the transaction is not a partnership matter. And it seems plain that a loan from one partner to another is not a partnership transaction, notwithstanding the fact that the borrower intends to put the money into the firm, and does so. Accordingly, it is well settled that the lender in such a case can maintain an action for the recovery of the money, although there has been no settlement of the partnership accounts: *Currier v. Webster*, 45 N. H. 226; *Crater v. Biningner*, 45 N. Y. 545; *Morgan v. Nunes*, 54 Miss. 312, 313; *Scott v. Campbell*, 30 Ala. 728; *Grigsby v. Nance*, 3 Ala., N. S., 347, 351; *Terrill v. Richards*, 1 Nott & McC. 20.

4. The title to the mine was taken in the name of Bull, as

additional security for the loan. And it is argued that under the provision that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by a mortgage" (Code Civ. Proc., sec. 726), the plaintiff cannot foreclose the mortgage upon Mrs. Strong's property without at the same time foreclosing on the mine. But the plaintiff has commenced only one action. The fact that he has omitted some of the security would, under the decisions, be a waiver of the mortgage upon the omitted portion: *Mascarel v. Raffour*, 51 Cal. 242. And (aside from the question of suretyship, which is considered below) the mortgagee is free to make such waiver if he chooses. The chief argument of the respondent in this regard is, that the mortgaged property constitutes a fund which must first be exhausted before a personal judgment can be had against the mortgagor. And this proposition seems to be established by the decisions: See *Bartlett v. Cottle*, 63 Id. 366; *Biddle v. Brizzolara*, 64 Id. 354. But the plaintiff here does not seek a personal judgment against any one, and hence the rule has no application.

5. It is contended for the respondent that Mrs. Strong was a mere surety, and was discharged for two reasons:—

(a) Because no claim was presented against the estate of the principal debtor. If we assume that the fact of suretyship sufficiently appears, the point is, nevertheless, not well taken. The precise point was decided in favor of the appellant in *Sichel v. Carrillo*, 42 Cal. 493. The only argument made by respondent in this regard is, that the decision is incorrect in principle, and unsupported by authority. But to this we cannot agree. It was well settled in this state, as elsewhere, that mere delay of the creditor to proceed against the principal would not discharge the surety: *Humphreys v. Crane*, 5 Id. 173; *Kritzer v. Mills*, 9 Id. 22, 23; *Hartman v. Burlingame*, 9 Id. 557; *Williams v. Covillaud*, 10 Id. 419; *People v. Jenkins*, 17 Id. 500. And this is still the law: *Preston v. Hood*, 64 Id. 406; Civ. Code, sec. 2823. In extension of this principle, it was held that the surety was not discharged, even if the delay of the creditor was such that his remedy against the principal became barred by limitation: *Whiting v. Clark*, 17 Cal. 407. And it was but a short step from this to the position that the loss of the creditor's remedy against the estate of the principal, by non-action as to presentation of the claim, did not discharge the surety. This was the decision in *Sichel v. Carrillo*, *supra*. And the point has been ruled the same way in other states:

Johnson v. Planters' Bank, 4 Smedes & M. 165; 43 Am. Dec. 480; *McBroon v. The Governor, etc.*, 6 Port. 32; *Villars v. Palmer*, 67 Ill. 204; and see *Banks v. State*, 62 Md. 88.

(b) It is claimed that the surety was discharged because the plaintiff in his complaint in this action expressly released his claim against the estate of the principal. The statement in the complaint in this regard is, that the plaintiff "hereby expressly waives all recourse against any of the property or estate of said Charles L. Strong, deceased, not included in the aforesaid deed, and he relies solely on his lien on the premises described in said deed for the repayment of his said advances." In making this waiver, the learned counsel for the plaintiff must have proceeded upon the theory that both of the Stronges were principal debtors. If, however, Strong was alone the principal, and his wife was the sole owner of the property, and was a mere surety for him, it is a very grave question whether she was not discharged by this act of the plaintiff. Was she a mere surety? There can be no doubt but that the debt was the debt of the husband alone. The complaint expressly alleges that the mortgage was given to secure money advanced and to be advanced "to and for account of said Charles L. Strong." And the evidence accords with this allegation. The appellant says in his reply brief that "the money advanced by the plaintiff was as much for her benefit as that of her husband." But there is nothing in either the pleadings or the evidence to justify this remark. The only possible sense in which, upon this record, she can be said to have been interested is that in which every wife may be said to be interested in her husband's transactions; and it is hardly necessary to say that this general interest does not make her separate property liable for his debts.

The debt being the debt of the husband alone, if the property mortgaged was the separate property of the wife, she was a surety so far as the property is concerned: *Spear v. Ward*, 20 Cal. 674; *Hassey v. Wilke*, 55 Id. 528. The court finds that it was her separate property; and while the evidence upon the question is meager, we cannot say from the record that the finding of fact ought not to stand. The difficulty about the defense is, that it is not pleaded. The release of a surety by discharge of the principal is new matter, and must be pleaded: *Mulford v. Estudillo*, 23 Id. 100; *Bostwick v. McEvoy*, 62 Id. 502, 503. And there is nothing either in the complaint or in Mrs. Strong's answer which states either that she was a

surety, or that the property was her separate property. From some of the phraseology of the answer, the contrary inference is to be drawn. Nor can it be said that the cause was tried upon the theory that any such defense was set up. The evidence as to the ownership of the property may have come in with reference to the homestead. Wherever the course of the parties at the trial is allowed to supply omissions in pleading, such course must appear clearly and be beyond all controversy. This defense, therefore, cannot be considered.

6. It is argued that there was a valid homestead upon the property, and that for this reason a claim ought to have been presented against the estate. When the case was here before, we were of opinion that the case of *Camp v. Grider*, 62 Cal. 21, required claims upon the homestead to be presented; and that it made no difference that the homestead was upon the separate property of the survivor. With reference to the latter proposition, further examination and reflection, after rehearing, have convinced us that we erred, and that the fact that the homestead was upon the separate property of the survivor takes it out of the rule laid down in *Camp v. Grider*. Except for the homestead, it is clear that the separate property of the survivor is not a part of the estate of the decedent, and that (all demands against the estate being waived) it is not necessary or proper to present a mortgage upon such separate property as a claim against the estate. Now, whatever may be the nature of the interest which the husband acquired in his wife's separate property by virtue of the homestead, it vested in the wife at his death: *Estate of Burdick*, 76 Cal. 639. It was not a part of his estate, and since the plaintiff made no claim against the estate, nor against property which was a part of the estate, it was not necessary to present a claim to the administrator. See, generally, *Shadt v. Heppe*, 45 Id. 437. We think the somewhat general language of the statute is not to be construed so as to cover such a case.

It cannot be contended that the failure to present a claim as to the debt extinguished it, and that the lien, being a mere incident to the debt, expired with it. Because, although a claim which is not presented becomes "barred," it is not "extinguished": *Whitmore v. San Francisco Savings Union*, 50 Cal. 149.

No question as to the rights of general creditors of the estate is involved here, because the plaintiff, having waived all claim against the estate, is not such a creditor. And we

desire what is said above to be understood with reference to the precise facts of the case before us, viz., where the homestead is upon the separate property of the survivor. We neither express nor intimate any opinion as to what would be the rule where the homestead is upon the separate property of the decedent, or upon the community property.

The positions as to the power of the court to grant a rehearing, and the sufficiency of the order granting it, do not require special notice.

We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

FOOTE, C., concurred.

BELCHER, C. C., took no part in this opinion.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

Rehearing denied.

PARTNERSHIP—WHEN AND FOR WHAT GROUNDS ACTIONS MAY BE MAINTAINED BETWEEN PARTNERS: See extended note to *Cowsee v. Prince*, 12 Am. Dec. 649-651. Partner may sue his copartner before settlement for destruction, conversion, or injury to property used in the partnership business: *Newby v. Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503, and note 509. A partner may sue his copartner for injuries to the firm business through dishonest practices: *Boughner v. Black*, 83 Ky. 521; 4 Am. St. Rep. 174, and note 178.

MARRIED WOMEN—ACKNOWLEDGMENTS, SUFFICIENCY OF, IN GENERAL: See extended note to *Hughes v. Lane*, 50 Am. Dec. 444. Acknowledgment of deeds in general: See extended note to *Livingston v. Kettelle*, 41 Id. 168-184.

FORECLOSURE OF MORTGAGE.—Where there is surety for debt secured by mortgage, the creditor has an election, of which he cannot be deprived, whether he shall proceed in equity upon his mortgage, or at law against the debtor or surety: *Cullum v. Emanuel*, 1 Ala. 23; 34 Am. Dec. 757. After a complainant in a foreclosure suit has elected to pursue his remedy in the chancery court by a sale of the mortgaged property, he has submitted his claims to the equitable remedy, and if his application for an execution to collect the reported deficiency on such sale is refused, he cannot proceed by suit at law for its collection: *Shields v. Riopelle*, 63 Mich. 458.

SURETIES DISCHARGED BY INDULGENCE TO PRINCIPAL: See note to *N. H. Savings Bank v. Colcord*, 41 Am. Dec. 685, and cases therein cited; *Martin v. Pope*, 6 Ala. 532; 41 Am. Dec. 66; *Johnson v. Planters' Bank*, 4 Smedes & M. 165; 43 Am. Dec. 480, and note; *Price v. Dime Savings Bank*, 124 Ill. 317; 7 Am. St. Rep. 367, and note; *First National Bank v. Gerke*, 68 Md. 449; 6 Am. St. Rep. 453, and extended note 458-460. A surety is not discharged by creditor's failure to present claim to the administrator of the

deceased principal within the time prescribed by law; for the sureties may, in such a case, compel the presentment of the claim in due time, and thus preserve their recourse against the estate: *Johnson v. Planters' Bank*, 4 Smedes & M. 165; 43 Am. Dec. 480. As a general rule, the contract of suretyship is an original undertaking, and the surety is bound therein to the full extent of the liability of the principal: *Philadelphia etc. R. R. Co. v. Knight*, 124 Pa. St. 58.

CIRCUMSTANCES WHICH DISCHARGE A SURETY, AS DECIDED BY RECENT CASES. — It is well settled that an agreement between a creditor and the principal debtor to extend the time of payment for a definite period discharges the surety, when such agreement is made without his consent, even though it may redound to the surety's benefit: *Stuart v. Lancaster*, 84 Va. 772. Any agreement under which the time for principal's performance is enlarged or extended, without the surety's consent, releases such surety: *Burton v. Andes*, 83 Id. 445; but a surety on a note who makes a payment thereon after maturity, and indorses thereon an extension of time at an increased rate of interest, does not thereby make himself liable as a principal debtor, when such indorsement was made at the instance and request of the principal debtor: *Hayward v. Fullerton*, 75 Iowa, 371; compare *Legrand v. Fitz*, 83 Va. 862.

PLEDGE BY WIFE FOR DEBT OF HUSBAND. — When a man and wife jointly make a note in satisfaction of a debt of the former, barred by the statute of limitations, and the wife pledges a note, payable to her, as security therefor, she cannot withdraw such pledge, except in like manner and under the same circumstances as her husband might do so; and the pledgee may enforce the note so pledged to the full amount of the joint note, although such joint note is not founded upon a sufficient consideration: *Enoch v. Newton* 65 Mich. 86.

[IN BANK.]

CARLTON v. WILLIAMS.

[77 CALIFORNIA, 89.]

ACKNOWLEDGMENT REQUIRED TO LEASE EXECUTED BY MARRIED WOMAN — ACCEPTANCE OF RENT WILL NOT VALIDATE INSTRUMENT. — Lease executed by a married woman must be acknowledged, in California, in order to be valid; and the fact that she accepts rent does not validate an unacknowledged lease, but at most creates a tenancy terminable by proper notice.

ACTION of ejectment. Section 1093 of the Civil Code of California provides that "no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her" in a manner prescribed.

Collier and Mulford, for the appellant.

Hunsaker and Britt, for the respondent.

HAYNE, C. Action of ejectment. The defendant claims the right to the possession under a lease. The lease was from a married woman, and was not acknowledged. The argument is, that a lease by a married woman is not one of the instruments which are required to be acknowledged. We see no merit whatever in the argument.

The fact that rent was accepted did not validate the lease, but at most created a tenancy terminable by proper notice; and it was so terminated.

The findings are sufficient.

We therefore advise that the judgment be affirmed, with fifty dollars damages.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed, with fifty dollars damages.

ACKNOWLEDGMENT BY MARRIED WOMAN: See extended note to *Livingston v. Kettelle*, 41 Am. Dec. 179, 180. A married woman's contracts are absolutely void, unless executed in conformity to the statute: *Scott v. Battle*, 85 N. C. 184; 39 Am. Rep. 694; *Bressler v. Kent*, 61 Ill. 426; 14 Am. Rep. 67; *Love v. Watkins*, 40 Cal. 517; 6 Am. Rep. 624; *MacLay v. Love*, 25 Cal. 367; 85 Am. Dec. 133; *Dankel v. Hunter*, 61 Pa. St. 392; 100 Am. Dec. 651; *Grapengether v. Fejervary*, 9 Iowa, 163; 74 Am. Dec. 336; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593; *Mason v. Brock*, 12 Ill. 273; 52 Am. Dec. 490; *James v. Fisk*, 9 Smedes & M. 144; 47 Am. Dec. 111; *Watson v. Bailey*, 1 Binn. 470; 2 Am. Dec. 462; *Evans v. Commonwealth*, 4 Serg. & R. 272; 8 Am. Dec. 711; *Watson v. Mercer*, 6 Serg. & R. 49; 9 Am. Dec. 411; *Chase's Case*, 1 Bland, 206; 17 Am. Dec. 277; *Barnett v. Shackelford*, 6 J. J. Marsh. 532; 22 Am. Dec. 100; *Orn v. Haisley*, 22 Fla. 317; *Warren v. Jones*, 69 Tex. 462; *Williams v. Oudd*, 26 S. C. 213; 4 Am. St. Rep. 714, and note 718.

[IN BANK.]

PEEK v. PEEK.

[77 CALIFORNIA, 106.]

STATUTE OF FRAUDS — MARRIAGE DOES NOT CONSTITUTE PART PERFORMANCE. — Marriage is not of itself a part performance of a verbal agreement to convey real property, in consideration of the marriage, sufficient to take the case out of the statute of frauds.

STATUTE OF FRAUDS — POSSESSION WHEN PART PERFORMANCE. — Possession does not constitute a part performance of a verbal agreement by a husband to convey real property to the wife, in consideration of the contemplated marriage, sufficient to take the case out of the statute of frauds, where the wife simply resides upon the property with her husband.

STATUTE OF FRAUDS—VERBAL AGREEMENT TO CONVEY REAL PROPERTY EXECUTED IN EQUITY ON ACCOUNT OF FRAUD—VOLUNTEER WITHOUT NOTICE.—Equity will enforce a verbal agreement by a husband to convey real property to the wife, in consideration of the contemplated marriage, where the marriage is brought about, without the execution of the conveyance, by means of the husband's fraudulent representations; and the agreement may be enforced against a child of the husband by a former marriage, to whom the husband conveys the property without consideration, notwithstanding the child was innocent of the fraud.

DEED—DEBT DUE FROM GUARDIAN TO WARD, WHEN NOT A CONSIDERATION.—Money which a father owes his child as guardian does not constitute a consideration for a deed from the father to the child, so as to make the child a purchaser for value, and not a volunteer, in the absence of any consent by the child or sanction by the probate court to such an application of the debt.

DEED—MORAL OBLIGATION DOES NOT CONSTITUTE VALUABLE CONSIDERATION.—Promise by a father to the mother on her death-bed that their child should have certain property creates a mere moral obligation, and does not constitute a valuable consideration for a deed of the property from the father to the child.

RESULTING TRUST IN FAVOR OF ONE WHO ADVANCES PART OF PURCHASE PRICE—INTEREST OF HEIR IS NOT CONSIDERATION FOR DEED OF ENTIRE TRACT.—Trust results to a mother who furnishes a portion of the purchase price of land, the title to which is taken in the name of the father, to an extent corresponding to the proportion of the price furnished by her, and the child can claim as her heir; but the child's interest as heir is not a consideration for a deed of the entire property from the father to the child.

ACTION of ejectment. The facts are stated in the opinion.

Rowell and Rowell, Harris and Allen, and Wells, Van Dyke, and Lee, for the appellant.

H. C. Rolf, for the respondent.

HAYNE, C. Ejectment, with a cross-complaint by defendant praying for a conveyance of the legal title. The facts are as follows: One L. R. Peek orally promised the defendant that if she would marry him he would, on or before the marriage, convey to her the property in controversy. She relied upon this promise, and married him "for no other reason or consideration."

The conveyance was not made. He put it off by excuses and protestations, and on the morning of the marriage, without the knowledge of defendant, conveyed the property to his son by a former marriage, who was then a boy about ten years old. The marriage with defendant did not prove a happy one, and after a year's residence upon the property, Peek deserted the defendant, and the son, Lee Peek, brought the present

tion to recover possession of the property. The court below gave judgment for the plaintiff, and the defendant appeals.

The foundation of the defendant's claim being the promise of L. R. Peek, the first question to be considered is whether such promise was of any validity. It is clear that it was within the statute of frauds. But it is contended that there was such part performance and fraud as would induce a court of equity to give relief, notwithstanding the statute.

We think that if the actual fraud of L. R. Peek be left out of view, there was no such part performance as would take the case out of the statute. There may undoubtedly be cases of a part performance of oral antenuptial agreements sufficient to warrant their enforcement in equity: See *Neale v. Neale*, 9 Wall. 1. But it seems to be generally agreed that the marriage alone does not amount to such part performance: See *Atherly on Marriage*, 90; *Browne on Statute of Frauds*, 4th ed., sec. 459; *Henry v. Henry*, 27 Ohio St. 121. With reference to this subject, Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own grounds": 1 Story's Eq. Jur., sec. 768. Nor does the fact that the defendant resided with her husband upon the property make any difference. The reason assigned for holding possession to be part performance is, that unless validity be given to the agreement the vendee would be a trespasser. But it is manifest that this reason would not apply where the vendor was the husband, and the vendee the wife, living with him upon the property. The possession which is referred to by the cases which hold it to be sufficient part performance is a possession exclusive of the vendor: *Browne on Statute of Frauds*, 4th ed., sec. 474.

But the fact that the marriage was brought about by the actual fraud of L. R. Peek seems to us to make a difference. There can be little doubt upon the record that there was actual fraud on his part. He denies that he made any promise to convey the property in controversy. But the court finds that he did make it, and taking this to be the fact, we think that the defendant's account, as to the time of the promise and of the reason she married him without the conveyance, must be accepted as the true one. According to her testimony, the promise was repeated up to the time of the marriage, and she was induced to have the ceremony performed before the con-

veyance was executed by means of excuses and protestations which must have been made for the purposes of deceiving her. On the day before the marriage he pretended that he was going to have the deed executed at once. He said to the defendant: "The officers are in town that are required to draw up the papers. Come to-night and I will have the place deeded to you, and the fifteen thousand dollars put in your name. He left me in the hotel, and in a few minutes he came and told me that Mr. Frank McKenny was out of town, and it could not be attended to that evening." The next day "he said he would have the deeds drawn, and he went up and said that they were all busy at the court-house, and he couldn't have it done at that time, and he called on me again with the same story,—that the gentlemen at the court-house were busy, and that he could not have the deeds fixed, and that I could rest contented." He, however, succeeded in inducing the defendant to marry him that evening, by protesting that the papers should be executed as soon as practicable. After the marriage he kept up for a short time the pretense that he was going to fulfill his promise, but never did so.

It seems clear that he never intended to have the deed executed. The story that he could not have it done because the officers at the court-house were busy is ridiculous. On the very day that he was making this excuse, he got a deed executed, conveying the property to his son. And the fact that he induced the defendant to marry him by promising to convey the property to her, when at that very time he was conveying it to somebody else, seems conclusive as to his fraudulent intent. We think, therefore, that the conclusion of the court below, that the deed was not made "with any fraudulent intent whatever," is not sustained by the facts.

This fraud on the part of L. R. Peek, by which he induced the defendant to irretrievably change her condition, seems to us to be ground for relief in equity. It has been laid down that if the agreement was intended to be reduced to writing, but was prevented from being so by the fraudulent contrivance of the party to be bound by it, equity will compel its specific performance: 1 Story's Eq. Jur., sec. 768; Atherly on Marriage, 85. And the recent case of *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256, is exactly in point. In that case a widow, owning 160 acres of land, orally promised a man that if he would marry her she would devote the proceeds of the land to their joint support. Relying upon this promise he mar-

her, but subsequently ascertained that on the eve of the marriage she had conveyed the property to her children by former marriage, "in consideration of love and affection." The court held that he could maintain an action to have the deed set aside on the ground of fraud. Compare also *Petty v. Petty*, 4 B. Mon. 215; 39 Am. Dec. 501.

We do not say that the mere fraudulent omission to have an agreement reduced to writing would of itself be ground for specifically enforcing the agreement. But where the fraudulent contrivance induces an irretrievable change of position, equity will enforce the agreement. And the marriage brought about by the fraudulent contrivance is a change of position within the meaning of the rule. In *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, in reasoning upon somewhat different facts, to the conclusion that, in order to be ground for the enforcement of the oral contract, the fraudulent contrivance must have induced some irretrievable change of position, the court said: "The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation, that if procured by artifice, upon the faith that the settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute." This, we think, is a correct statement of the law.

It is argued, however, that the plaintiff knew nothing of the fraud, and therefore is not affected by it. But it is very clear that a mere volunteer, however innocent, cannot retain the fruits of the fraud. And we think that with reference to at least a portion of the property, the plaintiff was a mere volunteer. There are two grounds upon which it is urged that he was a purchaser for valuable consideration. In the first place, it is said that his father was his guardian, and as such owed the plaintiff a balance of \$148, and that this sum was part of the consideration of the deed. But there was no consent of the ward to such an application of the sum due him. His testimony is as follows: "I never paid my papa any money for the deed that he showed me. I do not know anything about how much money was mentioned in the deed as being the consideration for it. I never knew anything about that. Nothing of that kind passed between us. No property, or money, or

anything. I did not have any property at that time to give him. If I had any, I didn't know it." So that, even if the ward could have consented to such an appropriation of his funds, without the sanction of the probate court, there was no such consent. Nor was there any sanction of the probate court. It may be that upon a proper settlement of the guardian's accounts a much larger sum will be found to be due from him. He cannot get rid of liability to his ward in that way.

In the next place, it is said that L. R. Peek promised his first wife, upon her death-bed, that the son should have the property. But it is clear that such promise was a mere moral, and not a valuable, consideration. It did not prevent the plaintiff from being a volunteer: See, generally, *Lloyd v. Fulton*, 91 U. S. 484, 485.

Finally, it is argued that the first wife furnished half of the money with which the property was purchased, and that a trust resulted to her in consequence. This was the view taken by the trial court. But conceding that a trust did result, it did not affect the whole property, but at most only a portion corresponding to the proportion of the price which she furnished. And the portion which it did affect was in no sense a consideration for the deed which is involved here. Upon the theory that a trust resulted to the first wife, the plaintiff must claim as her successor in interest. It does not appear that she left a valid will in his favor, and if not, he could succeed to a portion only of her interest. Furthermore, it might possibly become a question as to whether the defendant took with notice of the son's equitable interest, and as to how she would be affected thereby. These latter questions have not been argued, and we think they should be left open upon the retrial.

It is deserving of serious consideration whether L. R. Peek, who was a party to the contract which the defendant relies upon, should not have been joined as a party to the cross-suit. But the objection as to his non-joinder as a defendant to the cross-complaint was not taken by demurrer, and is not argued in the respondent's brief, and for these reasons we express no opinion concerning it.

We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

STATUTE OF FRAUDS. — Marriage does not take out of the statute of frauds a parol agreement to convey lands in consideration of the marriage: *Welch v. Whippley*, 62 Mich. 15; 4 Am. St. Rep. 810. Compare *Green v. Green*, 34 Kan. 740; 55 Am. Rep. 256.

STATUTE OF FRAUDS — PART PERFORMANCE — POSSESSION. — Possession before a parol agreement of lease for seven years, and continued afterwards, is too doubtful in its nature to be considered as part performance, so as to take the case out of the statute of frauds: *Jones v. Peterman*, 3 Serg. & R. 543; 8 Am. Dec. 672. Compare *Givens v. Calder*, 2 Desaus. Eq. 172; 2 Am. Dec. 686. Parol sale of land, accompanied by possession, passed title as valid as though it were by written conveyance, in Texas, before the adoption of the statute of frauds in that state: *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 108. Possession taken by a purchaser under agreement for the sale of lands, at a time when the seller had no control over them, is not such part performance of the agreement as will take it out of the operation of the statute of frauds: *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133. Compare *Rankin v. Simpson*, 19 Pa. St. 471; 57 Am. Dec. 668. Where land of which the owner was in possession was sold under a judgment against him, and a sheriff's deed executed to the purchaser, but it was subsequently orally agreed between the parties that if the owner would pay the judgment against him he should retain his land, and the purchaser would reconvey to him, and he paid the judgment, and continued in possession, but no reconveyance was made, such continued possession will be held to refer to the oral contract, and, together with the performance of the latter by the owner, will be sufficient to take the transaction out of the operation of the statute of frauds: *Simmons v. Headlee*, 94 Mo. 482.

FRAUDULENT CONVEYANCES. — A mortgage secretly entered into by an intended husband in contemplation of marriage, and to defeat the intended wife's rights of dower and homestead, is void: *Kelley v. McGrath*, 70 Ala. 75; 45 Am. Rep. 75; *Hamilton v. Smith*, 57 Iowa, 15; 42 Am. Rep. 39; *Petty v. Petty*, 4 B. Mon. 215; 39 Am. Dec. 501, and note 505; *Thayer v. Thayer*, 14 Vt. 107; 39 Am. Dec. 211, and extended note 218-220; see also *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642, and note 649. But a voluntary conveyance by a father to his children on the eve of marriage, though made without the knowledge or consent of his intended wife, is not fraudulent as to her, where his intention is to provide for the children, and not to defraud the wife: *Fennessey v. Fennessey*, 54 Ky. 519; 4 Am. St. Rep. 210, and note 215.

CONSIDERATION. — A mere moral obligation or duty as an executed consideration is not sufficient as such to support a subsequent express promise: *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399.

RESULTING TRUSTS, WHEN AND UNDER WHAT CIRCUMSTANCES ARISE: *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and note 530.

[IN BANK.]

EX PARTE STERNES.

[77 CALIFORNIA, 188.]

JUDGMENT — CONTEMPT — COLLATERAL ATTACK ON HABEAS CORPUS. — Attack by *habeas corpus* upon the judgment of a court committing the prisoner for contempt is subject to the rules applicable to collateral assaults upon judgments in other cases.

JUDGMENT — CONCLUSIVENESS OF RECORD ON COLLATERAL ATTACK. — Record of a court, acting within its jurisdiction, must be considered as conclusively speaking the truth, until set aside or vacated in a direct proceeding. No evidence can be received to contradict it collaterally.

JUDGMENT — ADJUDICATION OF EXISTENCE OF FACT NECESSARY TO GIVE JURISDICTION — CONCLUSIVENESS ON COLLATERAL ATTACK. — Judgment record is conclusive evidence of jurisdiction, until set aside or reversed in a direct proceeding, when the jurisdiction of the court depends on the existence of a litigated fact, which is adjudged to exist.

JUDGMENT — CONCLUSIVENESS OF ADJUDICATION IN COLLATERAL PROCEEDING AS TO DUE SERVICE OF PROCESS NECESSARY TO GIVE JURISDICTION. — Adjudication by court that process necessary to give it jurisdiction was duly served is conclusive in a collateral proceeding. If the process, or the manner in which it was served, is irregular, the jurisdictional infirmity can be cured only by some proceeding in the court where the action is pending, or by appeal.

CONTEMPT — HABEAS CORPUS — OFFICER'S FAILURE TO PRODUCE BODY OF PRISONER — AFFIDAVIT — ORDER TO SHOW CAUSE. — Officer's failure to produce the body of the prisoner, in obedience to a writ of *habeas corpus*, when he has the power to do so, is a contempt committed in the face of the court, and no affidavit of the facts or order to show cause is necessary to authorize the court to commit him.

HABEAS CORPUS. The petitioner, George H. Sternes, was confined in the county jail of Nevada County, under a commitment for contempt. It was stipulated that the facts set forth in the petition for the writ could be proved by evidence on the part of the prisoner; but it was objected that evidence of such facts was incompetent and inadmissible to contradict the recitals in the return. It appeared, from the petition, that Sternes was a deputy sheriff for Yuba County. On April 4, 1888, a warrant of attachment was issued out of the superior court of Yuba County for the arrest of one Ah Fong, for an alleged contempt of court. On the same day, Sternes arrested Ah Fong in Nevada County, and delivered him into the custody of one W. H. Lee, who was present assisting in the arrest, with directions to Lee to take Ah Fong to the county of Yuba, and there deliver him into the hands of the sheriff of that county. A writ of *habeas corpus* was afterwards issued out of the superior court of Nevada County, directed to John Doe, and commanding him that he have the

body of Ah Fong, together with the cause of detention, before said court at a time specified. On April 5th, the sheriff of Nevada County served a copy of the writ, but not the original, upon Sternes. At the time the writ was issued, Ah Fong was in the custody of Lee, in the county of Yuba; and at the time of the service of the writ upon Sternes, Ah Fong was in the custody of the sheriff of that county. After the service of the writ, Sternes demanded the prisoner from the sheriff, that he might comply with the command of the court; but the sheriff refused, and still refuses, to deliver up the prisoner. On the return of the writ, after hearing evidence, Sternes was adjudged guilty of contempt in failing to produce the body of Ah Fong, and was fined one hundred dollars, and ordered imprisoned until the fine should be paid, at the rate of two dollars per day. No warrant of attachment or order to show cause was issued before the adjudication of contempt. Further facts are stated in the opinion.

E. A. Forbes and A. L. Hart, for the petitioner.

Hale and Craig, for the respondent.

PATERSON, J. From the stipulation filed herein, it appears the petitioner could prove, if permitted to do so, that at the time of the issuance of the writ of *habeas corpus* commanding him to produce the body of one Ah Fong, said Ah Fong was in the actual custody of one W. H. Lee, in the county of Yuba, and that at the time of the service of the writ upon petitioner said Ah Fong was in the actual custody of the sheriff of Yuba County, at Marysville, and therefore out of the jurisdiction of the superior court of Nevada County on a *habeas corpus* proceeding (Const., art. 6, sec. 5); that the original writ was not delivered to petitioner, who is a deputy sheriff of Yuba County, as required by the Penal Code, section 1478; that after service of an imperfect copy of the writ upon him, he demanded of the sheriff of the county of Yuba the delivery to him of the custody of Ah Fong, that he might comply with the command of the court; but said sheriff refused, and has always refused, to permit him to take said Ah Fong into his custody; and that "the said court adjudged that the said Sternes had the actual custody of the said Ah Fong, and willfully refused to produce him in said court without any trial of said fact, or any charge upon that subject having been made, or any warrant or attachment, notice, or order to show cause having been issued, or any opportunity for the said Sternes to be heard

upon the said question without any trial, and without any evidence."

The stipulation aforesaid was made at the hearing to aid the court in the dispatch of its business, counsel for respondent objecting, however, that no evidence could be received in this matter to contradict or impeach the recitals and findings contained in the judgment of the superior court.

The judgment of conviction, upon which respondent relies as a conclusive answer to the petition and return to the writ herein, sets forth a copy of the petition upon which the writ was issued out of the superior court, commanding the production of the body of the said Ah Fong, a copy of the writ, and concludes as follows: "And [said writ] having on said fifth day of April, 1888, been duly served upon George H. Sternes, at Nevada township, Nevada County, California; and said matter having, on the sixth day of April, 1888, been, at the request of said Sternes, continued for hearing until ten o'clock, A. M., April 7, 1888; and on said last-named date said Sternes having appeared in said court, and made and filed in said court his return to said writ, in which return it was alleged, among other things, that said Sternes was the person named John Doe in said writ; that said Ah Fong was not in his custody or under his control at the time of the issuance of or the service of said writ upon him; and said judge having thereupon proceeded to take testimony as to said matter, and it appearing therefrom, to the satisfaction of said judge, that said Ah Fong was in the custody and under the control of said Sternes at the time of the issuance and service upon him of said writ, and that it was within the power of said Sternes to produce the body of said Ah Fong, in obedience to said writ, at the time of service of said writ upon him; and said judge having thereupon continued the further hearing of said matter until Monday, April 9, 1888, at two o'clock, P. M., at the request of said Sternes, to enable him to produce the body of said Ah Fong before said judge, in obedience to said writ,—now, on this day last aforesaid, said George H. Sternes, having appeared before said judge, and having failed to produce the body of said Ah Fong before such judge, in obedience to said writ, it is therefore adjudged that said George H. Sternes is guilty of contempt of said court," etc.

We understand counsel for petitioner to admit that the functions of the writ of *habeas corpus* issued herein do not extend beyond an inquiry into the jurisdiction of the superior

court in which the judgment was rendered, and the validity of the process upon its face; but he contends that we may and should inquire whether, at the time the writ of *habeas corpus* was issued for the production of the body of Ah Fong, he, said Ah Fong, was held in actual custody within the jurisdiction of the court issuing it, and if it be determined that he was not within the jurisdiction of said court, the order made adjudging the petitioner guilty of contempt was beyond the jurisdiction of the court, and therefore null and void.

The attack which is made upon the judgment of the superior court involves an examination of evidence *dehors* the record, and is, therefore, subject to the rules applicable to collateral assaults upon judgments in other cases. One of the plainest of these rules is, that from the time of the service of process upon the parties to the action or proceeding the court acquires such jurisdiction over them that its subsequent proceedings, however irregular, are not void. The first inquiry before the superior court upon the return made by the respondent, Sternes, therein, was to determine the issue as to whether said Ah Fong was, or was not, in his custody, or under his control, at the time of the issuance of or service of said writ upon him, said Sternes. It appears from the judgment that the judge proceeded to take testimony as to said matter, and found as a fact that said Ah Fong was in the custody and under the control of said Sternes at the time of the issuance and service upon him of said writ, and that it was within the power of said Sternes to produce the body of said Ah Fong in obedience to the writ at the time of service of the writ upon him. This is the record of the court, acting within its legitimate powers, and that record must be considered as speaking the truth, and as conclusive until it has been in some way set aside or vacated. No evidence can be received to contradict it: Freeman on Judgments, secs. 619, 126; *Lewis v. Dutton*, 8 How. Pr. 103; Cooley's Constitutional Limitations, 407. "When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside, or reversed by a direct proceeding": *Bloom v. Burdick*, 1 Hill, 138; 37 Am. Dec. 299; and it has been held in this state that even "an inferior board may determine conclusively its own jurisdiction or power, by adjudicating the existence of facts upon the existence of which

its jurisdiction or power depends": *In re Grove Street*, 61 Cal. 453; see also *Segee v. Thomas*, 3 Blatchf. 20; *Ex parte Cottrell*, 59 Cal. 421.

The court further found that the writ issued on the fifth day of April, 1888, had been duly served upon George H. Sternes at Nevada township, Nevada County, California. There being nothing in the record to contradict this finding of the court, it is conclusive, and no evidence can be received to contradict it. If the process, or the manner in which it was served, is irregular, the jurisdictional infirmity can be cured only by some proceeding in the court where action is pending, or by appeal: *Dorente v. Sullivan*, 7 Cal. 279; *Peck v. Strauss*, 33 Id. 685.

The failure of Sternes to produce the body of Ah Fong, as the court found he had the power to do, before the court, in obedience to the writ, was a contempt committed in the face of the court, and no affidavit of the facts constituting the contempt was necessary to give the court knowledge thereof: *In re Robb*, 64 Cal. 431. An order to show cause or notice of a motion for an attachment would not have served Sternes any useful purpose. He had an opportunity, as shown by the judgment, to explain the circumstances of his failure to obey the writ, and the court was not in duty bound to accept as true his return to the writ. The court may have erred in its proceedings subsequent to the issuance and service of the writ, and by a misapprehension of the facts or misconstruction of the evidence have done the petitioner here a great injustice; but so long as that court permits its record to remain as it is, other courts must treat it as the action of that court, and as conclusive upon all the matters decided by it and essential to its judgment: *Ellis v. Inhabitants of Madison*, 13 Me. 312; *Watson v. Balch*, 1 Pac. Rep. 775.

The petitioner is remanded to the custody of the sheriff.

Rehearing denied.

HABEAS CORPUS.—A writ of *habeas corpus* cannot reach errors or irregularities which render proceedings voidable merely, but only such defects, in substance, as renders the process or judgment absolutely void: *Barton v. Saunders*, 16 Or. 51; 8 Am. St. Rep. 261, and note 266. Jurisdiction to commit can be questioned on *habeas corpus*, but the regularity of the proceedings cannot be inquired into: *In re Morris*, 39 Kan. 28; 7 Am. St. Rep. 512, and note 515. Prisoner will not be discharged on *habeas corpus* because of errors in the sentence imposed by a court of competent jurisdiction: *Sennott's Case*, 146 Mass. 490; 4 Am. St. Rep. 344, and note 348. *Habeas corpus* cannot be used to review errors or irregularities: *Commonwealth v. Lecky*, 1 Watts, 6'

26 Am. Dec. 37, and note 40-49; *Bell v. State*, 4 Gill, 301; 45 Am. Dec. 130, and note 133; *Ex parte Adams*, 25 Miss. 883; 59 Am. Dec. 234; *Williamson's Case*, 26 Pa. St. 9; 67 Am. Dec. 374, and note 395; *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55; *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529, and note 536; *Ex parte Gibson*, 31 Cal. 619; 91 Am. Dec. 546, and note 553; *State v. Galloway*, 5 Cold. 328; 98 Am. Dec. 404.

CONTEMPT. — When a person is imprisoned for contempt, unless the proceedings leading thereto are so grossly defective as to render them void, the judgment of commitment, in the absence of statute, cannot be reviewed in any other tribunal: *Robb v. McDonald*, 29 Iowa, 330; 4 Am. Rep. 211; *Ex parte Adams*, 25 Miss. 883; 59 Am. Dec. 234, and note 243. No appeal lies from a judgment for contempt: *Shattuck v. State*, 51 Miss. 50; 24 Am. Rep. 624, and note; *Boston v. State*, 39 Ala. 551; 87 Am. Dec. 49. Contempt is a specific criminal offense, and the power to punish it belongs to the court in which or against which it was committed; and no other court, not even the highest tribunals, can interfere with the exercise of this authority by writs of *habeas corpus*, *mandamus*, or otherwise: *Williamson's Case*, 26 Pa. St. 9; 67 Am. Dec. 374, and note 375; and in *State v. Galloway*, 5 Cold. 328, 98 Am. Dec. 404, it was even decided that a judgment of conviction for contempt is not subject to revision by any court, whether co-ordinate or of superior jurisdiction, either by appeal, writ of error, or otherwise; and that it makes no difference that the judgment is void. Compare *Ex parte Adams*, 25 Miss. 883; 59 Am. Dec. 234.

CONTEMPT. — It is the duty of the judge, to whom an application for a writ of *habeas corpus* is made, to issue it, if the petition is made in conformity to the statute; and it is likewise the duty of all persons to respect and obey such writ; and if it has been obtained upon false statements, or by the suppression of facts which would prevent its issue, it will be dismissed upon the hearing; but till this is done, every person who willfully disobeys its commands, or unlawfully resists or counsels resistance to its execution, is in contempt of court, and may be summarily punished therefor: *Patterson v. Deaver*, 99 N. C. 407.

JURISDICTION — RECITALS IN JUDGMENTS. — A recital in record by the court that defendants in proceedings had been served with process is evidence that they were so served, and that the court has jurisdiction of their persons; and such judgment, and the record thereof, cannot be attacked collaterally for irregularity or for fraud: *Brickhouse v. Sutton*, 99 N. C. 103; 6 Am. St. Rep. 497; *Hahn v. Kelley*, 34 Cal. 391; 94 Am. Dec. 742, and note 765 et seq.; note to *Melia v. Simmons*, 30 Am. Rep. 748-752. Where the jurisdiction of a court depends upon the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact: *Thornton v. Baker*, 15 R. I. 533; 2 Am. St. Rep. 925. But it has been held in one case that a judgment of a court may be collaterally impeached by the defendant by proving that he was not served with process, and did not appear, although the record recited that he was served, and also contained a forged appearance by attorney on his behalf: *Ferguson v. Crauford*, 70 N. Y. 253; 26 Am. Rep. 589, and foot-note. Compare note to *Goodwin v. Sims*, ante, p. 27, for recitals in judgments of service of process. A judgment which contains recitations declaring service of citation upon the defendant cannot be attacked in a collateral proceeding by showing that no legal service was in fact made: *Davis v. Robinson*, 70 Tex. 395.

RECORDS OF COURTS OF GENERAL JURISDICTION impart absolute verity, and cannot be collaterally impeached from without: *Hahn v. Kelley*, 34 Cal.

291; 94 Am. Dec. 742, and note; *Bateman v. Miller*, 118 Ind. 345; *Gutterman v. Schroeder*, 40 Kan. 507. Where a *de facto* corporation institutes a suit to vest title to realty in itself, and pending the suit becomes one *de jure*, the decree entered in conformity to its prayer remains firm and effectual until annulled by a direct proceeding, and is not open to collateral attack: *Leish etc. Coal Co. v. Bingham*, 97 Mo. 197.

[IN BANK.]

EX PARTE McNULTY.

[77 CALIFORNIA, 164.]

CONSTITUTIONAL LAW—ACT REGULATING PRACTICE OF MEDICINE.—The California act of April 1, 1878, requiring that every person practicing medicine or surgery shall possess certain qualifications, and shall have issued to him a certificate from a board of examiners, appointed by a medical society, which may be revoked for unprofessional conduct, is not unconstitutional as a whole.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO ENACT LAW PUNISHING PHYSICIAN FOR "UNPROFESSIONAL CONDUCT."—It is not within the police power of the legislature to enact a law punishing a physician who has been decided to be competent to practice, and to whom a certificate has been issued, for what is styled "unprofessional conduct," in advertising himself as a specialist in certain diseases. Per Thornton, J.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO DELEGATE AUTHORITY TO BOARD OF MEDICAL EXAMINERS TO DECLARE WHAT ACTS SHALL CONSTITUTE CRIMINAL OFFENSE—RULES AND REGULATIONS.—Legislature cannot delegate to a board of medical examiners the power to declare what acts shall constitute a criminal offense; but even if it could delegate to the board the power of declaring by rules and regulations what unprofessional conduct of a physician should constitute a crime, no one can be convicted of such crime, in the absence of rules and regulations. Per Patterson, J.

HABEAS CORPUS—SUFFICIENCY OF COMPLAINT OR INDICTMENT AND OF EVIDENCE—PUBLIC OFFENSE NOT COMMITTED.—Sufficiency of a complaint or indictment, or of the evidence to support it, cannot, in general, be inquired into on *habeas corpus*; but when the facts charged and proved do not constitute a public offense, the defendant will be discharged on *habeas corpus*.

CRIMINAL LAW—PRACTICING MEDICINE AFTER REVOCATION OF CERTIFICATE.—Practicing medicine after revocation of the certificate issued by a board of medical examiners does not constitute a criminal offense, under the California act of April 1, 1878, regulating the practice of medicine. The act only makes it a crime to practice without first having procured a certificate.

CRIMINAL LAW—CONSTRUCTIVE CRIMES.—The question whether certain conduct is made a crime by statute must be determined from its language. Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of the English and American criminal law.

HABEAS CORPUS. The facts are stated in the opinion.

McAllister and Bergin, for the petitioner.

Taylor and Haight, and George E. Harpham, for the respondent.

McFARLAND, J. The petitioner, P. Roscoe McNulty, is imprisoned by force of a judgment of the lower court upon conviction of what is asserted to be a crime under the act of the legislature entitled "An act supplemental to and amendatory of an act to regulate the practice of medicine in the state of California" (approved April 3, 1876), which became a law April 1, 1878: Stats. 1877-78, p. 918. This act requires, generally, that every person practicing medicine or surgery shall possess certain qualifications, and shall have issued to him a certificate from one of three boards of examiners, each board to be appointed by one of three certain medical societies named in said act. It is provided, also, that a certificate may be revoked by the board granting it, when its holder has been guilty of "unprofessional conduct."

The first contention of counsel for petitioner, that the statute above mentioned is *in toto* unconstitutional, and therefore entirely void, has been determined the other way by this court in *Ex parte Frazer*, 54 Cal. 94. In that case it was held that the general frame-work of this statute was not in violation of the constitution, although no opinion was expressed as to the validity of certain independent provisions which it contains. The contention that the police court of San Francisco, in which the prosecution was commenced, had no jurisdiction of the offense sought to be charged against petitioner, because it is punishable by imprisonment for 365 days, need not, under the view which we take of another point in the case, be here determined. And the same may be said of the position taken by petitioner, that, under the authority of *Ex parte Cox*, 63 Cal. 21, the legislature could not delegate to the board of examiners the power to declare by rules and regulations what should constitute "unprofessional conduct," and thus, by its own act, establish a crime; and, further, that if such power could be delegated, then, as in this case, no rules declaring what should constitute unprofessional conduct had been adopted, petitioner is in the position of one who has been convicted under a void *ex post facto* law. There are also some other points made by counsel, which we do not think necessary to be here discussed. The complaint upon which petitioner was tried was insufficient, and, in our opinion, the

demurrer to it should have been sustained. It is true that, generally, the sufficiency of a complaint or an indictment cannot be inquired into on *habeas corpus*. Where the complaint, though inartificially drawn, shows an evident attempt to state the essential facts which constitute the crime sought to be charged, the defect in the statement would not warrant the discharge of the defendant. It is true, also, that upon *habeas corpus* the court will not, ordinarily, look into the sufficiency of the evidence to prove the facts which constitute the offense. But when the facts charged or attempted to be charged in the complaint or indictment, and proved by the evidence, do not constitute any public offense, then the defendant will, upon *habeas corpus*, be discharged: *Ex parte Kearny*, 55 Cal. 215.

Now, in this case it clearly appears that in the police court, and in the superior court to which an appeal was taken, the case was tried, and the petitioner convicted upon the theory that the complaint stated, or attempted to state, and the evidence showed, the following facts, and none other, viz.: The petitioner, having regularly received a diploma from a recognized medical college of Pennsylvania, made application on January 8, 1884, to one of the boards of examiners constituted under said statute above mentioned for a certificate; and on said day said board issued to him a certificate in due form, as provided for in said statute, and he commenced the practice of his profession. Afterwards, on August 25, 1885, the said board made an order revoking said certificate for "unprofessional conduct" on the part of petitioner, consisting in this: that he had, in the San Francisco Chronicle newspaper, and in a printed pamphlet, advertised himself as a specialist in certain enumerated diseases. After the action by the board, the petitioner continued to practice medicine, and for thus continuing to practice he was charged, tried, convicted, and punished. But in our opinion this conduct on the part of petitioner did not constitute a criminal offense, or subject him to any punishment under the statute in question. Section 1 of the said act of 1878, after providing for the certificate, declares that "such certificate shall be conclusive as to the right of the person named therein to practice medicine and surgery in any part of the state." And the only penal clause, or clause creating a criminal offense, in the act is contained in section 7, and is as follows: "Any person practicing medicine or surgery in this state, without first having procured a certificate so to do from one of the boards of examiners appointed by one

of the societies mentioned in section 2 of this act, shall be guilty of a misdemeanor, and shall be subject to the penalties provided in section 13 of the act, to which this act is amendatory and supplemental." Nothing is declared in this act to be a crime except practicing "without first having procured a certificate." Practicing after an order of the board revoking the certificate for unprofessional conduct is not declared to be a crime, and no penalty is attached to it. Respondent's position really is, that the legislature must have intended such conduct to be a criminal offense. It would be vain to inquire what intent lurked in the minds of the persons who happened to be members of the legislature when the act was passed. It certainly would be a forced thing to imagine their intent to be that a man should lose his liberty for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting a board of examiners. At all events, the question whether or not the conduct in question is made a crime must be determined from the language used in the statute, and we find there nothing that declares such conduct to be a criminal offense. Nor is there anything in what is left of the act of 1876 (although no reference is made to that act in the complaint) which makes the conduct ascribed to petitioner a crime. Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law. Let the petitioner be discharged.

THORNTON, J. I concur in the conclusion reached by Justice McFarland, and am inclined to concur in the reasons given by him for such conclusion. But I cannot hold that the legislature has the constitutional power to enact a law punishing a physician who has been decided to be competent to practice, as was the case with the petitioner here, when a certificate was issued to him, for what is styled "unprofessional conduct," and as advertising himself in a newspaper and in a printed pamphlet as a specialist in certain enumerated diseases. This goes beyond the police power, under which power the statute to be considered was enacted. That a rule of professional conduct by a board of medical men prohibiting such advertisements, and declaring them unprofessional, can be declared a misdemeanor and punished, would extend the police power beyond whatever has been allowed.

As well might the board declare that wearing any other hat than one of a white color, by a physician, should be unprofessional conduct, and cause it to be punished as a misdemeanor. The advertisement of the character mentioned does no harm to any one. It may be of benefit to the public, by giving to the subjects of the diseases mentioned information of the existence and residence of a person who has peculiar skill in curing them. Such laws are passed to prevent injury to the community, not to prevent or exclude a benefit to it.

We are told that at one time the able and celebrated Hahnemann, a competent and properly licensed physician, was prosecuted and persecuted in a German state for compounding his own medicines, under a law enacted in the interest of apothecaries. I cannot conclude that such a statute here could be regarded as a valid exercise of power under our constitution. Professional etiquette prescribed by a class of men so eminent in standing as the medical practitioners of our state is a matter to be regarded and respected; but it has its limits, and I cannot conceive that a violation of it by a competent physician can ever be by the state made a penal offense. The rules in regard to such etiquette between the members of the medical as between those of the legal profession must find their enforcement from a source other than the state. It is highly proper and just that it should be so. As the state cannot make the conduct of petitioner penal directly, it cannot be so indirectly. To hold, as contended here by counsel, adverse to the claims of petitioner would be to affirm the validity of a statute in which an attempt is seemingly made to accomplish that indirectly which cannot be directly done. For the reasons given above, the petitioner, in my judgment, should be discharged from custody.

PATERSON, J. There is no doubt that the exercise of the right to practice medicine, or to pursue any other lawful employment, may be regulated by law; but the right is one of the privileges and immunities in which the citizen is entitled to be secured and protected under the constitution and laws of the state. In *Ex parte Cox*, 63 Cal. 21, it appeared that the petitioner had been convicted of a misdemeanor, consisting of a violation of one of the rules and regulations of the board of state viticultural commissioners. This court there said: "The legislature had no authority to confer on the officer or board the power of declaring what acts shall constitute

a misdemeanor. The legislative power of the state is vested in the senate and assembly. That power could not, as to the case before us, be delegated to the officer or board." In this case, even if it be conceded that the legislature could delegate to the board of examiners the power to declare by rules and regulations what should constitute unprofessional conduct, and thus by its own act establish a crime, it is sufficient to say that no such rules or regulations have ever been prescribed. Before one can be convicted of a crime, there must be some rule of action prescribing with some certainty, and expressing intelligibly, the sovereign will. Whatever may be said of the right of the board of examiners to revoke the license of the petitioner to practice medicine, and thus cast upon him the odium which must always follow such an expulsion from the ranks of reputable practitioners, the liberty of the petitioner cannot be made to depend upon a thing so vague and uncertain as the undefined views of the members of the board as to what constitutes unprofessional conduct. In every case, to constitute crime there must be a union of act and intent. How can it be said there is an intent to commit a crime, where the law, which it is claimed has been violated, exists only in the minds of individuals? The authorities upon which the respondent relies, namely, *State v. Board*, 32 Minn. 324, *In re Smith*, 10 Wend. 449, are not in point so far as the question of crime is concerned. The first case cited was a *mandamus* to compel the state medical examining board to issue to the applicant a certificate. The other was *certiorari* to annul an order expelling Smith from a medical society, and declaring him incapable of practicing medicine.

HABEAS CORPUS. — The constitutionality of an act under which a party has been convicted may be inquired into on *habeas corpus*: *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901, and note 903; *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381.

[IN BANK.]

EX PARTE AH MEN.

[77 CALIFORNIA, 198.]

CONTEMPT—TITLE OF PROCEEDING.—Contempt, though a specific criminal offense, is prosecuted, as a matter of practice, in the cause or proceeding out of which it arose, and not as a separate proceeding with a title of its own.

CONTEMPT COMMITTED OUT OF VIEW OF COURT—AFFIDAVIT OF FACTS.—Affidavit of facts constituting contempt, committed out of view of the court, need not set forth the pendency of the cause or proceeding, or the provisions of the order or writ therein, which has been violated; but it is sufficient if the acts done in violation of the order or writ are set forth.

CONTEMPT—JUDICIAL NOTICE OF PROCEEDINGS IN ACTION PENDING.—Judicial notice is taken by the court of the proceedings in an action pending before it on a prosecution for contempt for disobeying an order or writ issued therein.

CONTEMPT—INQUIRY ON HABEAS CORPUS.—Inquiry on *habeas corpus* into the commitment of the prisoner for contempt is confined to the determination whether or not the court had jurisdiction. No irregularity in the proceedings taken to obtain jurisdiction, and no question of injustice or wrong that may have been done to the petitioner, can be considered.

CONTEMPT—CONCLUSIVENESS OF JUDGMENT ON COLLATERAL ATTACK.—Judgment of a court having jurisdiction committing a person for contempt is final and conclusive, and cannot be collaterally attacked, however irregular the proceedings taken to obtain jurisdiction may have been.

JUDGMENT—RECITAL OF JURISDICTIONAL FACTS—CONCLUSIVENESS ON COLLATERAL ATTACK.—Judgment conclusively establishes existence of jurisdictional facts recited by it, so far as collateral proceedings are concerned; and no evidence *dehors* the record can be received to impeach them.

CONTEMPT FOR DISOBEDIENCE OF PROCESS—FICTITIOUS NAMES OF PARTIES.—It is sufficient if the court, on the hearing of contempt proceedings, ascertains the true name of the defendant therein, and so states it in the judgment, when the fact that the true names of the defendants in an action were unknown is alleged in the complaint, followed by a prayer that when discovered the complaint might be amended by alleging their true names, and an injunction follows the complaint, and is directed to the defendants by fictitious names, but is actually served on the defendants, and the affidavit for a warrant of attachment for contempt describes the defendants as persons who had been thus served.

HABEAS CORPUS. The facts are stated in the opinion.

Cross and Simonds, for the petitioner.

E. A. Forbes and A. L. Hart, for the respondent.

PATERSON, J. Petitioner claims that he should be discharged from custody, for the following reasons: 1. Because the affidavit on which the warrant was issued was insufficient to give the court jurisdiction to order the arrest of petitioner

2. Because the petitioner was arrested under a general warrant of arrest in Nevada County by the deputy sheriff of Yuba County; 3. Because he was arrested in the night-time, and without an indorsement on the warrant of arrest to authorize the arrest at that time; 4. Because the warrant of arrest did not show upon its face facts authorizing the arrest; and 5. Because the petitioner is not named in the warrant of arrest, the only name used in the warrant being a fictitious name, and there being no other designation or description of the person to be arrested.

1. The affidavit on which the warrant of arrest was issued alleges in substance that since the service on the defendants of the injunction which had been issued on the sixteenth day of January, and served on defendants on the thirtieth day of the same month, said defendants, John Doe and others, have been working and operating the mine described in the complaint by the hydraulic process, in willful and gross disobedience of the orders and processes of the court. It describes particularly the manner in which the mine had been operated, and alleges that large quantities of material had been deposited into Deer Creek, tributary to the Yuba River, in violation of the writ of injunction. These allegations, we think, were sufficient. Section 1211 of the Code of Civil Procedure provides that "when the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees, arbitrators, or other judicial officer." In this state, although contempt of court is a specific criminal offense, and a judgment of conviction thereof the same as a judgment in a criminal case (*Ex parte Hollis*, 59 Cal. 408), the practice has always been to prosecute a matter of contempt in the cause or proceeding out of which it arose, and not as a separate proceeding, with a title of its own. It is, therefore, unnecessary in the affidavit to set forth the pendency of the cause or proceeding, or the provisions of the order which has been violated. The court takes judicial notice of those matters, and it is quite clear, we think, that "the facts constituting the contempt," or the facts stated by the referee, within the meaning of section 1211, *supra*, are sufficiently stated, if the acts done in violation of the order or writ are set forth. The most that can be said against the affidavit is, that it is inartificially drawn.

In determining on *habeas corpus* whether the court had jurisdiction, we must distinguish between a complaint or affidavit which charges no offense at all, and one which, though inartificially drawn, intimates the existence of the facts necessary to constitute the offense, and indicates a purpose to declare thereon: *Ex parte Kearny*, 55 Cal. 228.

2. It would be sufficient to say, in answer to the other grounds assigned as reasons for the discharge of the petitioner, that if the facts are as represented, and could be considered here, they show irregularity in the obtaining of jurisdiction, but do not show such a want of jurisdiction as would authorize his discharge on *habeas corpus*. The petitioner was actually taken before the court below and given an opportunity to defend himself against the charge made in the affidavit. We have already held that that affidavit was sufficient for the issuance of the warrant. The court had jurisdiction of the subject-matter; and however irregular the proceedings taken to obtain jurisdiction of the person, its judgment is final and conclusive. Section 1222 of the Code of Civil Procedure provides that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." The fact that the process has not been served by the proper person, or at the proper place or time, or that the warrant or order upon which a prisoner has been arrested is void, and the arrest unlawful, will not render the judgment void, and subject to a collateral attack: *Ex parte McGill*, 6 Tex. App. 498; *Dorente v. Sullivan*, 7 Cal. 279; *Peck v. Strauss*, 33 Id. 685; *Owens v. Gotzian*, 4 Dill. 438; *Ex parte Kellogg*, 6 Vt. 511; *Freeman on Judgments*, sec. 126. After final judgment of conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true, even though the prisoner has been kidnaped, and forcibly brought before the court from a foreign jurisdiction: *People v. Rowe*, 4 Park. Cr. 253; *United States v. Lawrence*, 13 Blatchf. 306; *Ex parte Scott*, 4 Barn. & C. 446; *State v. Smith*, 1 Bail. 283; 19 Am. Dec. 679; *State v. Brewster*, 7 Vt. 118; *State v. Ross*, 41 Iowa, 467. In the last-named case, it was said: "The liability of the parties arresting them [the defendants] without legal warrant for false imprisonment or otherwise, and their violation of the penal statutes of Missouri, may be ever so clear, and yet the prisoners not be entitled to their discharge." See also *Mahon v. Justice*, 127 U. S. 700, where the cases bearing

upon this question are thoroughly reviewed by Mr. Justice Field.

Nearly all of the objections urged against the validity of the judgment convicting petitioner of a contempt are answered by the recitals in the judgment itself. If the record were silent as to the jurisdictional facts, jurisdiction would be presumed; but the judgment itself recites all of the facts necessary to the exercise of jurisdiction by the court. It appears upon the face of the judgment that the injunction was duly issued and served, and that the same has ever since remained in full force and effect; that after service upon the defendants, the acts alleged in the affidavit were committed by the defendants in violation of the injunction and in contempt of the authority of the court. It recites that the petitioner was "duly and regularly brought into court, pursuant to said warrant of attachment"; that the person sued and served as James Doe in said action, and proceeded against by said name, answered that his true name was Ah Men. The matters thus adjudicated are conclusive, and no evidence *dehors* the record can be received to impeach them: Freeman on Judgments, 619; *Ex parte Sternes*, ante, p. 251.

3. The fact that the true names of the defendants in the action were unknown was alleged in the complaint, followed by a prayer that when discovered the complaint might be amended by alleging their true names. The injunction seems to have followed the complaint, and was directed to the defendants under said fictitious names, but it was actually served upon the defendants. No answer was filed by them, nor did they make any appearance in the action. They continued, however, to do the things which they were by the writ of injunction enjoined and restrained from doing. In the affidavit for the warrant of attachment, the defendants were described as persons who had been served with the injunction theretofore issued. At the hearing, the court found the true name of petitioner to be Ah Men, and it is so stated in the judgment. This is sufficient.

With the question of injustice or wrong that may have been done to this petitioner by the procedure against him, we have nothing to do. The only inquiry before us is, whether the court had jurisdiction of the person and of the subject-matter. We think that the petitioner should be remanded to the custody of the sheriff of Yuba County, and it is so ordered.

CONTEMPT: See the case of *Ex parte Sternes*, 77 Cal. 156; ante, p. 251, and note thereto.

[IN BANK.]

ESTATE OF COOK.

[77 CALIFORNIA, 220.]

JUDGMENT IS RENDERED AT TIME COURT PRONOUNCES DECISION — NEED NOT BE IN WRITING OR SIGNED BY JUDGE. — Judgment becomes rendered, and the rights of the parties established, at the time the court pronounces its decision; and it is not necessary to its validity that it should be in writing or signed by the judge.

JUDGMENT OF DIVORCE BECOMES EFFECTIVE AT TIME OF ITS RENDITION, AND NOT ENTRY. — Judgment of divorce becomes effective at the time of its rendition, although it is not entered by the clerk until a subsequent date.

JUDGMENT IS NOT RENDERED VOID BY MERE ABSENCE OF FINDINGS — FINDINGS NOT NECESSARY IN CASE OF DEFAULT. — Judgment is not rendered void in any case by the mere absence of findings; and in case of default findings are not necessary, and form no part of the judgment roll.

JUDGMENT MAY BE ENTERED AFTER RENDITION AT REQUEST OF ANY ONE. — Judgment may be entered after its rendition at the request of one not a party to the action. It is the duty of the court to have the judgment entered, no matter by whom its attention may be called to the matter.

JUDGMENT — NOTICE OF ENTRY NEED NOT BE GIVEN. — Party against whom the judgment is rendered is not entitled to notice of its entry.

JUDGMENT OF DIVORCE MAY BE ENTERED AFTER DEATH OF PARTY. — Judgment of divorce rendered in favor of a party during her lifetime may be entered after her death.

ESTATE OF DECEDENT — PETITION FOR FINAL DISTRIBUTION CANNOT ASK FOR ACCOUNTING. — Petition by an administrator for the final distribution of the estate of the decedent cannot properly contain averments for the purpose of charging a distributee with, and compelling him to account for, property of the deceased, especially for property which came into his possession in another state.

APPEAL from a decree of the superior court distributing the estate of a decedent, and from an order denying a new trial. The facts are stated in the opinion.

Henry C. McPike and James M. Seawell, for the appellant.

Tilden and Tilden, Eugene N. Deuprey, L. M. Hoefler, and James G. Carson, for the respondent.

McFARLAND, J. After a more mature consideration of this appeal, upon rehearing, we are satisfied that the court below was in error, and that the decree appealed from must be reversed.

The appeal is taken by William E. Miller, assignee of William W. Richards, from a decree of distribution, by which the estate of the deceased was distributed, one half to her mother, Mary A. Strasberger, and the other half to Theodor

T. Cook, who was adjudged to be the surviving husband of the deceased. As the deceased left no issue or father, one half of her estate went to her mother, and the other half to her surviving husband; and the question to be determined was, whether the said Theodore T. Cook, or the said William W. Richards, was such surviving husband.

Upon the trial of this issue, Cook proved that he was married to the deceased (whose maiden name was Emma Strasberger) on the twenty-sixth day of December, 1873. It was alleged and claimed on the part of said Richards and his assignee, Miller, that the deceased was divorced from said Cook; that afterward, on May 30, 1880, she was legally married to the said Richards, and that Richards, from the date last named, was, and continued to be, her lawful husband until her death. To maintain this issue on his behalf, Miller offered in evidence a certain judgment roll duly authenticated. To the introduction of this judgment roll Cook objected, upon the grounds that the decree of divorce therein contained was entered on petition of said Richards, who was a stranger to the record; "that there is no foundation for the same, and that it is not a decree"; that it was entered after the death of the plaintiff to the action, and without notice; that there were no findings to support it, and that the papers constituting the judgment roll are immaterial, irrelevant, and incompetent. The court sustained the objections, and appellant excepted. The appellant then offered to prove the marriage of the deceased to Richards after the alleged divorce, and the assignment by the latter of all his right and interest in the estate in California, and in the hands of the administrator, to Miller. This offer was objected to upon substantially the same grounds as above stated, and the objection was sustained. These two rulings are assigned as error, and present the point involved.

The judgment roll offered in evidence shows, substantially, these things: The deceased, Emma Cook, commenced an action in March, 1880, in the superior court of San Francisco against the said Theodore T. Cook to obtain a divorce. The complaint was sufficient in form and substance, and averred willful neglect as the cause of action. Summons was duly issued March 20, 1880, and was personally served on the defendant on the same day, in the city and county of San Francisco. The defendant not answering or appearing, default was entered against him on the 6th of April, 1880. The

decree contained in said judgment roll was entered on the eighth day of September, 1885, *nunc pro tunc* as of the twenty-third day of April, 1880. It recites that the action came on regularly for hearing on the 6th of April, 1880; that the issuance and service of the summons, and the default of defendant appearing, the case was referred to F. W. Lawler, a referee, to take proof of all the material allegations, and report the same to the court; and that said referee made his report.

The said decree proceeds as follows: "The report of said referee having been finally filed in this action, and this action having been finally submitted on the twenty-third day of April, A. D. 1880, and this court having then fully considered the same, and ordered that a decree be entered therein in favor of said plaintiff dissolving the bonds of matrimony, then, on said twenty-third day of April, A. D. 1880, and theretofore existing between the said plaintiff, Emma Cook, and the said defendant, Theodore T. Cook, on the ground of willful neglect, which said judgment of said court was duly rendered in open court by this court on said twenty-third day of April, A. D. 1880, and then and there entered in the minutes of said court; and this court, upon petition of William W. Richards, filed herein on the fourth day of September, A. D. 1885, having on the seventh day of September, 1885, ordered, adjudged, and decreed that the said decree of divorce ordered by said judgment of said court to be entered in favor of said plaintiff as aforesaid on said twenty-third day of April, A. D. 1880, be forthwith entered by the clerk of this court *nunc pro tunc* as of said twenty-third day of April, A. D. 1880, and that the judgment roll in this action be forthwith made and filed by the clerk of this court *nunc pro tunc* as of said twenty-third day of April, A. D. 1880,— it is now therefore considered, ordered, adjudged, and decreed by this court," etc. The decree then proceeds to dissolve the bonds of matrimony between the parties as of April 23, A. D. 1880. The deceased, Emma Cook, who was the plaintiff in said action, died in the month of November, A. D. 1883, and of course was not living at the date of the entry of this decree. And counsel for respondent contends, — 1. That the action taken by the court on April 23, 1880, and recited in said decree, was not in any sense or for any purpose a judgment, and had no effect whatever upon the marriage relations of the parties; and 2. That the decree of September, 1885, was of no avail, because at the time of its entry one of the parties was dead.

The deceased, no doubt, considered that she was divorced on April 23, 1880, and could lawfully enter into a second marriage. It is averred in the petition of Richards that the said Theodore T. Cook also entered into a second marriage before the death of the deceased; and although there is no proof on that subject in the record, yet it may be fairly presumed, from his apparent acquiescence in the second marriage of the deceased until after her death, that he also supposed that a divorce had taken place, and that he could lawfully marry again if he so elected. If, therefore, the question here presented were a doubtful one, the leaning of the court should be in favor of the validity of the second marriage, and against the implication of bigamy.

We think, however, that former decisions of this court have with sufficient clearness solved the problem here involved against the contention of respondent. In those decisions a plain distinction is established between the rendition of judgment and its entry in the judgment-book.

In *Gray v. Palmer*, 28 Cal. 416, the question was whether an appeal from a judgment had been taken in time, the statute then requiring the appeal to be taken within one year after "the rendition of the judgment." In that case, the judgment had been rendered more than two months before it had been entered by the clerk; and the appeal had been taken within a year after the entry, but not within a year after the rendition. And the court held that the appeal was too late.

Justice Sawyer, in delivering the opinion of the court, says: "After a careful review of these and other sections of the Practice Act, we cannot resist the conclusion that the terms 'rendition' and 'entry' are used in different senses, and to express the idea appropriate to those words respectively; and that there is a rendition of a judgment before it is actually entered in the judgment-book. Different stages of the proceeding are recognized by the statute as initial points from which other proceedings may be taken or other rights acquired. Thus the right of appeal attaches, and the time for taking it commences to run, from the rendition of the judgment by the court; the right to issue execution, from the time of the entry of the judgment rendered; and the judgment lien upon real estate attaches from the docketing of the judgment rendered and entered."

And again: "Upon the construction given by us, there are not two final judgments, as is argued by appellant. The clerk

enters the judgment rendered by the court. The court pronounces the judgment, and the clerk performs the ministerial duty of entering it. The judgment rendered is the judgment entered."

In *Casement v. Ringgold*, 28 Cal. 335, it was held (at a time when the statute provided for stated terms of court), that when the court had pronounced a judgment, it became the judgment of the court of the term at which it had been rendered, and that the clerk could perform the ministerial duty of entering it in the judgment-book after the expiration of the term. And the opinion in this case refers to *McMillan v. Richards*, 12 Id. 467, and *Hutchinson v. Bours*, 13 Id. 52, in which cases the entry of a judgment by the clerk is referred to as a mere ministerial act.

The same doctrine is clearly stated in *Peck v. Courtis*, 31 Cal. 209; *Genella v. Relyea*, 32 Id. 159; *McLaughlin v. Doherty*, 54 Id. 519; and in other cases decided by this court.

And in the *Estate of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, the very point here involved seems to have been definitely settled. The only difference between that case and the one at bar is, that in the former the decision of the court—that is, the rendition of the judgment—was in writing, and signed by the judge of the court, and filed with the clerk. But, as we shall see, those circumstances gave no additional significance or validity to the rendition of the judgment. One of the questions in the Newman case was, When did the judgment of divorce take effect as between the parties? And the court say: "The decree was signed by the judge on October 19, and was filed with the clerk on October 22, 1885. Thus rendered, it was binding on the parties and privies, although not entered until January 5, 1887. The clerk could not, by his failure to perform a ministerial duty, abridge the rights of any party interested."

If it were necessary to refer to general authorities, it would be found that their drift is the same way. Freeman, in his work on judgments, states the essence of the cases as follows: "Expressions occasionally find their way into reports and text-books, indicating that the entry is essential to the existence and force of the judgment. These expressions have escaped from their authors when writing on matters of evidence, and applying the general rule that in each case the best testimony which is capable of being produced must be received, to the exclusion of every means of proof less satis-

factory and less authentic. The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. . . . That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity": Freeman on Judgments, sec. 38.

In *Cal. S. Tel. Co. v. Patterson*, 1 Nev. 124, which was a well-considered case, the question was, What constitutes a judgment? And the court say: "This motion seems to be based upon a misapprehension of what constitutes a judgment; and counsel seem to have confounded the judgment itself with the entry or record thereof. The judgment is a judicial act of the court; the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. . . . The decision of the court is the judgment; the entry by the clerk is the evidence of it."

The current of English and American authorities is to the same point.

In some of the cases decided by this court and cited above, the judge, at the time of the rendition of the judgment, had prepared a written decision, generally in the form of a decree, and had in some instances filed it with the clerk; and counsel for respondent contends that those cases are not authority here, because in *Cook v. Cook* no such written decision or decree had been prepared, signed, or filed. But there is no statutory provision for the signing of a judgment by the judge, either before or after entry; and his signature gives to it no additional solemnity or validity: *Clink v. Thurston*, 47 Cal. 29. Where that practice is adopted, it is merely to give the clerk surer means of correctly entering what has been adjudged. But when, after the trial and final submission of the case, the court pronounces a judgment in apt language, which finally determines the rights of the parties to the action, and leaves nothing more to be done except the ministerial act of the clerk in entering it, and especially when what the court has pronounced has been entered in the minutes, then the judgment has been rendered, and the rights of the parties established. And such was the case in *Cook v. Cook*, whether we take the recitals in the decree entered in 1885 or the entry in the minutes in 1880, as stated in the petition of Richards.

In *Peck v. Courtis*, *supra*, no form of judgment had been written or signed by the judge. In that case the court say:

"As to the final judgment from which an appeal is taken, it appears from the record that 'the cause having come on to be heard before the court on the twenty-second day of December, 1863, upon the report of the referees, and the court having been sufficiently advised thereon, it was ordered, adjudged, and decreed by the court that the said report of said referees be confirmed, and that judgment be entered according to said report, and that said partition be effectual forever.' The judgment thus rendered on the twenty-second day of December, 1863, was not in fact 'entered' in the judgment-book by the clerk till July 25, 1864, some six months afterwards. But an appeal from a final judgment must be taken 'within one year after the rendition of the judgment.' The time begins to run from the time when the judgment is rendered, not from the time when it is entered. The rendition and entry of a judgment are entirely different things,—the one is to be performed by the court, and must be first in order of time, and the other by the clerk": 31 Cal. 209.

In *Genella v. Relyea*, 32 Cal. 160, the court say: "The court announced its judgment, and the order for judgment was entered in the minutes of the court on the 15th of August, 1865. The judgment was therefore rendered, and the time for taking an appeal commenced to run on that day."

In *Cal. S. Co. v. Patterson*, 1 Nev. 155, above cited, the court, on rehearing, say: "When a judge orders a judgment in a cause, and that order is entered in the journal or minutes of the court, and no further facts are to be ascertained to determine the exact amount and character of that judgment, but there simply remains the clerical duty of entering in the judgment-book that which the court has determined and ordered to be entered, this in our opinion is a final judgment from which an appeal lies."

Counsel for respondent contends that the case of *Macnevin v. Macnevin*, 63 Cal. 186, is in conflict with the other cases above cited. That case is very meagerly reported, and the precise point under discussion here was apparently not argued by counsel, or considered by the court. The court below in that case announced its decision in favor of defendant, and then made an order vacating certain allowances which it had granted plaintiff for alimony and counsel fees. From this order plaintiff appealed before there had been any entry of the general judgment in the case; and this court held that the order was not appealable as an order made after final judg-

ment. But at that time the code had been changed so as to provide that an appeal from a final judgment could not be taken until after entry; and all that the court can be considered as having decided in the case was, that, as an appeal from a judgment could not be taken until after its entry, therefore, for the purpose of an appeal, no order could be considered as an order made after final judgment which had not been made after the entry of the judgment.

In *Condee v. Barton*, 62 Cal. 1,—also relied on by respondent,—when the court had announced its findings of facts, and its conclusion of law upon said facts, that plaintiffs were not entitled to judgment, plaintiffs immediately moved that the conclusion of law be set aside, and that judgment upon the facts found be given for plaintiffs. Thereupon the court ordered that the entry of judgment be stayed until said motion could be heard, and upon the hearing of the motion the court ordered judgment for plaintiffs. Upon appeal this court held that the course adopted by the court below was not erroneous. But it can hardly be said that in that case the court had rendered any judgment at all, because the retraction was concurrent with the announcement of the first conclusion, and the intended judgment was expressly held in abeyance to await further consideration. And the concluding sentence in the short opinion of this court in that case must be considered with reference to the facts of the case. No such facts appear in *Cook v. Cook*.

None of the other cases cited by respondent from this court are in point.

The fact that the decree was entered upon the petition of Richards is of no significance. It was the duty of the court to have the judgment entered, no matter by whom its attention was called to the subject.

The mere absence of findings would not render a judgment void in any case; and in a case of default, findings are not necessary, and form no part of the judgment roll: Code Civ. Proc., sec. 670; *Mulcahy v. Mulcahy*, 51 Cal. 626; *Fox v. Fox*, 25 Id. 587.

There was no necessity for any notice to Theodore T. Cook before the entry of the judgment. It was the duty of the clerk at any time after the rendition of the judgment to enter it.

And the judgment having been rendered in the lifetime of the plaintiff, Emma Cook, there was no error in entering it after her death. There are abundant English and American

authorities to this point; but there is no need of citing them here, because this court has so held expressly in *Franklin v. Merida*, 50 Cal. 289; 95 Am. Dec. 129. That case was an action of ejectment. On the 2d of October, 1869, the court made the following order for judgment in favor of plaintiff, and it was entered by the clerk in his book of minutes of the court: "This cause having been heretofore tried before the court without a jury, and submitted for consideration and decision, it is now ordered that plaintiff in this cause have judgment against the defendants for the possession of the premises described in the complaint, together with costs of suit." No further entry was made by the clerk until the first day of October, 1874,—five years afterward,—when he entered up and recorded a formal judgment. An execution—or writ of restitution—was issued on this judgment, and the successors in interest of the defendant Merida were put out. They moved to be restored to the possession; and upon the hearing of that motion, it appeared that when the judgment was entered the plaintiff Franklin was dead; and that the judgment had been entered, and the writ issued, at the request of one Van Nest, to whom the title to the land had come, through mesne conveyances, from said Franklin, deceased. It appeared, also, that the judgment was entered on October 1, 1874, as of that date, and not *nunc pro tunc* as of October 2, 1869; and thereupon the attorney for Van Nest moved to amend the judgment so as to make it appear to be entered as of October 2, 1869, and in like manner to amend the writ of restitution, and the court below allowed the said motions to amend, but denied the application of the successors of the defendant to be restored to possession.

Upon appeal, the point made was, that the judgment was entered after the death of the plaintiff. But this court took the opposite view, and in its opinion uses this language: "There was no necessity for an amendment of the judgment. It was rendered October 2, 1869, in the lifetime of plaintiff, and recorded October 1, 1874, after his death. Nor was there any necessity to amend the writ of execution; for though it erroneously recited that the judgment had been rendered on the first day of October, 1874, still it otherwise correctly referred to the judgment in such a manner as to identify it. In these respects, the order below was erroneous; but we think that, under the circumstances, the motion to restore the defendants to possession was correctly denied. The writ, though

issued after the death of the judgment plaintiff, and in his name, was, in point of fact, issued and executed at the instance of, and for the benefit of, Van Nest, who is conceded to be the successor of the judgment plaintiff. Had he, as such successor in interest, applied regularly for the writ in the first instance, the court would have awarded it to him. What has been done is, therefore, correct in substance, though irregular in point of procedure. It is hardly worth while to turn Van Nest out, when it is clear that he must be immediately put back into possession." This case is determinative, not only of the point immediately under discussion, but of nearly every point made by respondent in the case at bar. The entry of the judgment in *Cook v. Cook*, on September 8, 1885, was proper, and perhaps necessary in order to furnish the requisite proof of the judgment when it was sought to be introduced as evidence in another proceeding.

(It may be well to observe that in the case of a statutory judgment entered by the clerk upon the rendition of a verdict by a jury, it may be fairly contended that the only judgment is the judgment actually entered by the clerk.)

Our conclusion is, that, under the circumstances here presented, the judgment in the said case of *Cook v. Cook* was rendered on the 23d of April, 1880, and that the divorce between said parties must be held to have been of that date, and that consequently the court below erred in sustaining the objections to the introduction of said judgment roll, and in excluding evidence of the marriage of said Emma Cook and said Richards after said twenty-third day of April, 1880.

Of course we have no commendation for the neglect of the clerk to enter the judgment in *Cook v. Cook* immediately after it was pronounced, or for the failure of the attorney of the plaintiff in that action to see to it that the judgment was then entered. But many of the most perplexing questions presented here arise out of the want of care or the want of capacity of attorneys and other officers of courts. It is the duty of the court, however, to protect the rights of litigants, even against the incapacity of their agents, except where such incapacity has placed those rights beyond the reach of legal justice.

2. The decree of distribution was made in this case on the petition of the administrator. In his petition, after stating what property of the estate there was in his hands, the payment of debts and taxes, and all other matters showing that

the estate was in condition to be finally distributed, he further alleges that the deceased left certain other property in the state of New York, which came into the hands of the said William W. Richards, which, he alleges, Richards never accounted for, and prays that Richards be cited to account for such property, and that if Richards be adjudged entitled to any portion of said estate, that he be charged with said property left by deceased in said state of New York. To the petition the appellant Miller demurred generally, upon the ground that an action for an accounting against Richards could not properly be united with a petition for final distribution, and specially to that part which seeks to require Richards to account for the New York property, for want of jurisdiction, etc. The court overruled the demurrer, and found that Richards received certain property left by deceased in New York; but as the court found that Richards was not an heir, no mention is made of the matter in the decree.

We think that the demurrer should have been sustained. We do not see how a petition which goes upon the theory that the administration is ready to be closed, and the estate is in a condition to be finally distributed, can properly include averments and a prayer which start the estate upon a fresh career of litigation,—even assuming that the court might have jurisdiction over property left by the deceased in New York, and that in a proceeding for the final distribution of the estate the probate court had jurisdiction to determine such equities as are asserted in the petition, and that the administrator could take a part in favor of one heir as against another.

The decree and order appealed from are reversed, and the cause remanded for further proceedings in accordance with this opinion.

The following is the opinion of Mr. Justice Thornton above referred to, rendered on the 26th of April, 1888:—

THORNTON, J. Emma Cook was never divorced from Theodore T. Cook. A divorce is not granted until the final decree is entered; and in the case of *Cook v. Cook* there was no entry of a final decree. The order of the 23d of April, 1880, in *Cook v. Cook*, was a direction that a decree dissolving the bonds of matrimony be entered, but it does not appear that this order was ever complied with. The attempt of the court on the 7th of September, 1885, to impart validity to the

alleged marriage of Emma Cook with William W. Richards after the 23d of April, 1880, by a *nunc pro tunc* decree dissolving the bonds of matrimony between Emma Cook and Theodore T. Cook could not have any such effect. As there was no decree dissolving the bonds of matrimony between the Cooks on the 3d of May, 1880, when it is claimed a marriage was had between Emma Cook and William W. Richards, and no such decree was ever entered during the lifetime of Emma Cook, after which a marriage was celebrated between Richards and Emma Cook, it cannot be held that there was ever a valid marriage between the parties last named.

The *nunc pro tunc* decree was made long after the death of Emma Cook, which took place in November, 1883. She was not divorced at the time of her death, and we cannot perceive how, after that time, the relation of Emma Cook to Theodore T. Cook could be changed by any decree of the court. The court below did not err in holding Theodore T. Cook the husband of Emma Cook at the time of her death, and in ruling out the judgment roll in *Cook v. Cook*.

This appeal is prosecuted by William E. Miller as the assignee of William W. Richards of the share of Emma Cook's estate claimed by Richards as her husband. And as it appears that Richards was never the husband of the decedent, the appellant Miller can have no interest in any other question presented on this appeal.

Rehearing denied.

JUDGMENT DEFINED: *Whitwell v. Emory*, 3 Mich. 84; 59 Am. Dec. 220.

JUDGMENT OF A COURT OF RECORD is considered to have been rendered on the first day of the term, irrespective of the day upon which it may in fact have been rendered: *Farley v. Lea*, 4 Dev. & B. 169; 32 Am. Dec. 690; *Withers v. Carter*, 4 Gratt. 407; 50 Am. Dec. 78.

JUDGMENT OF DIVORCE, after being signed by the judge and filed with the clerk, is binding upon the parties and their privies, although not entered by the clerk: *Newman's Estate*, 75 Cal. 213; 7 Am. St. Rep. 146.

DISMISSAL OF ACTION. — An action which is directed to be dismissed by the plaintiff is not dismissed until the judgment of dismissal has been entered in the judgment book, and an entry of the dismissal made in the register of actions: *Page v. Superior Court of Alameda*, 76 Cal. 372; *Page v. Page*, 77 Id. 83.

ENTRY OF JUDGMENT. — The provision of section 581 of the Code of Civil Procedure that an action may be dismissed "when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months," does not apply to existing verdicts, unless there was six months' neglect after the act took place: *Gardner v. Tutum*, 77 Cal. 458.

JUDGMENTS—SIGNATURE OF JUDGES.—The statutes requiring judgments to be signed by judges and clerks are not mandatory, and a failure to observe them will not *per se* render such judgments ineffectual: *Spencer v. Cook*, 102 N. C. 68.

[IN BANK.]

HILL v. FINIGAN.

[77 CALIFORNIA, 267.]

PLEDGE—PLEDGOR'S RIGHT TO TREAT PLEDGEE'S PURCHASE OF PLEDGED PROPERTY AS INVALID—UNREASONABLE DELAY BY PLEDGOR IN DISAFFIRMING SALE.—Pledgor has a right of election to treat the purchase of the pledged property by the pledgee at his own sale as invalid, but loses such right by failing to exercise it within a reasonable time after being informed of the purchase.

PLEDGE—UNREASONABLE DELAY BY PLEDGOR IN DISAFFIRMING PLEDGEE'S PURCHASE OF PLEDGED PROPERTY, WHEN QUESTION FOR JURY.—Jury may be instructed as a matter of law that the delay of the pledgor in disaffirming the purchase of the pledged property by the pledgee at his own sale was unreasonable, if the facts as to the delay are undisputed; but if the facts are disputed, it is proper to leave the question of reasonableness to the jury.

PLEDGE—JURY MAY BE INSTRUCTED THAT PLEDGOR RATIFIED PLEDGEE'S PURCHASE OF PLEDGED PROPERTY, IF PLEDGOR UNREASONABLY DELAYED TO OBJECT, AND NEGOTIATED FOR REPURCHASE.—Jury may be instructed that the pledgor ratified the purchase of the pledged property by the pledgee at his own sale, if he unreasonably delayed to object, after being informed of the purchase, and treated with the pledgee for the repurchase of a portion of the property, with knowledge of his rights. The instruction simply means that if the pledgor did certain things, he elected to treat the sale as binding.

PLEDGE—RATIFICATION BY PLEDGOR OF PLEDGEE'S PURCHASE OF PLEDGED PROPERTY—CONSIDERATION NOT REQUIRED.—Ratification by a pledgor of the purchase of the pledged property by the pledgee at his own sale does not require a consideration or the elements necessary to make a new contract.

PLEDGE—RATIFICATION BY PLEDGOR OF PLEDGEE'S PURCHASE OF PLEDGED PROPERTY—PLEDGOR'S KNOWLEDGE OF LAW PRESUMED.—Knowledge of the law, if essential to a ratification by the pledgor of the purchase of the pledged property by the pledgee at his own sale, will be presumed when the contrary does not appear.

PLEDGE—PLEDGOR CANNOT RETRACT AFFIRMANCE OR DISAFFIRMANCE OF PLEDGEE'S PURCHASE OF PLEDGED PROPERTY.—Pledgor's election to treat the purchase of the pledged property by the pledgee at his own sale as valid cannot afterwards be retracted; nor can an election to disaffirm the sale be retracted or renewed at a later date for the purpose of increasing the damages.

INSTRUCTION—HARMLESS ERROR—ASSUMPTION OF FACT IN APPELLANT'S FAVOR, AND OF UNDISPUTED FACT.—Instruction erroneously assuming a fact in favor of the appellant cannot be complained of by him; nor can the assumption of an undisputed fact in an instruction injure him.

INSTRUCTION — ABSTRACT INSTRUCTION WHICH COULD NOT HAVE MISLED JURY. — Purely abstract instruction which could not have misled the jury, in view of all the circumstances of the case, will not be reviewed on appeal.

ACTION for damages for the conversion of certain mining stock and diamonds. The facts are stated in the opinion.

Stanly, Stoney, and Hayes, for the appellant.

Garber and Bishop, for the respondent.

The COURT. Action for damages for the conversion of certain mining stock and diamonds. This property was pledged to secure the payment of money advanced by defendant at the request of plaintiff. Payment not having been made, the pledgee caused the property to be sold to satisfy the debt. The grounds of objection to the sale are, that although notice of the sale was given to the pledgor, none was given to the public, and that the pledgee himself was the purchaser at the sale. The defense was, that the want of notice to the public was at the pledgor's request, and to save him from expense, and that he did not elect to avoid the sale within a reasonable time, but upon being informed of the facts, ratified and confirmed it. The jury found a verdict for the defendant, and the plaintiff appeals. The principal points made for the appellant relate to the instructions.

1. It is claimed that the court erred in giving the following instruction: "If the jury find, from the evidence, that prior to June 13, 1878, Hill agreed with Finigan that the sale should be made without other or further notice to the public, or to him, than such as Hill already had, and that Finigan thereupon caused the sale to be made, and became a purchaser thereat, and that afterwards Hill, upon being informed of the fact that Finigan had purchased the property at such sale, did not, within a reasonable time, object to such purchase by Finigan, then you will find that Hill ratified the sale, and it thereby became valid and binding, and your verdict will be for the defendant." The argument against this instruction is, in the first place, that ratification is a fact, and that therefore it was improper for the court to tell the jury that they should infer it from other facts; and in the second place, that such other facts were not sufficient to support the inference which the court undertook to draw. But we think the instruction was proper. The substance of it was, that if the jury believed that there was unreasonable delay they

must find a verdict for the defendant. This included everything that was necessary for them to know in this regard. It was not necessary to tell them why this was so, and if there was any inaccuracy in stating the grounds of the rule laid down for their guidance, it was manifestly harmless. It is therefore immaterial to consider whether it is strictly accurate to say that unreasonable delay would amount to a ratification. We are inclined to think that in strictness a ratification implies some affirmative action, and that, if any reason were to be given to the jury for the explicit and positive directions embodied in the instruction, it would have been better to have said that the pledgor had a right of election to treat the sale as invalid, and that he would lose this right by failing to exercise it within a reasonable time. But it is unnecessary to express an opinion upon this. The direction to find a verdict for the defendant, if they believed that there was unreasonable delay, excluded the possibility of misapprehension on their part, and we think it was correct as a matter of law. The sale being voidable merely, there must be some period within which the pledgor must make his election as to whether he will avoid it or not. He cannot wait for the whole period of the statute of limitations, speculating upon the changes of the market: *Hayward v. Bank*, 96 U. S. 611. And this is a rule of law, and not an inference of fact. The learned counsel for the appellant will hardly contend that the pledgor can wait an unreasonable time, and if not, why is it not proper to tell the jury so? What constitutes an unreasonable time, is doubtless a question which may involve many elements. Possibly it would be advisable in many cases for the judge to enlarge somewhat upon the elements of this question; but if the appellant had desired this, he should have requested instructions in relation to it. In some cases the facts might be such as to render it proper for the judge to instruct the jury as a matter of law that the delay was unreasonable; and if the facts here had been undisputed, we think it would have been proper to have done so in this case. If it were undisputed that the pledgor had remained silent for nearly two months after being informed of the facts, and until the stocks had risen to the very high price at which they were on the 7th of August, we think that the judge should have instructed the jury, as a matter of law, that the delay was unreasonable, and that they must find for the defendant. But, as is stated below, the pledgor testifies that a day or so after the sale, when

he was presented by the defendant with a statement of account, he disaffirmed the sale, and announced his intention to treat it as invalid. And in view of this, and of this only, we think the submission of the question to the jury was proper.

2. It is contended that the court erred in giving the following instruction: "If you find, from the evidence, that the defendant caused the property pledged to him to be offered for sale at public auction, but without notice, and if at such sale the property was bid in by the defendant for fair market prices, and that higher prices were not obtainable at the time and place of sale, and if you further find that the plaintiff, upon being informed of such sale, made no objection thereto, but commenced to treat with the defendant for the purchase from defendant of a portion of the property, you will find that the plaintiff ratified the sale, and your verdict will be for the defendant." The argument against this instruction is similar to that against the preceding one, viz., that ratification is a fact, and that, therefore, it is improper to tell the jury that they should infer it from other facts; and that, if this were not so, the facts stated in the instruction were not sufficient to support the conclusion which the court directed the jury to draw, for the reason that the element of the pledgor's knowledge of the law was omitted. But we think the instruction was proper. It is perfectly true that our laws do not permit the judge to instruct the jury as to what inference of fact they are to draw. But whether or not a particular conception is of a "fact" or a "conclusion of law," is generally a matter of relation. In one connection, a word or phrase may stand for a fact, while in another the same word or phrase may designate a conclusion of law: *Levins v. Rovegno*, 71 Cal. 273; *Turner v. White*, 73 Id. 300. And although a finding that a party "ratified" a given transaction might in some cases be sufficient as a finding of fact, yet in the present instance all that we understand the instruction to mean, and all that the jury could have understood from it, is, that if they believed that the plaintiff did certain things, those things amounted to a sufficient election to treat the sale as valid, and that having once made his election, he was bound by it. The sufficiency of the election was a matter of law, and the binding force of it was a matter of law. Suppose that evidence had been introduced to the effect that the pledgor had expressly said to the pledgee: "I know that the sale was invalid because no public notice was given, and because you were the purchaser,

and that I can have it set aside; but knowing this I elect to treat it is valid, and hereby ratify and confirm it." We think that in such case there could be no doubt but that it would have been proper for the court to have told the jury that if they believed that he so said, there was a sufficient election to treat the sale as valid, and that he could not afterwards retract it; and if the facts enumerated in the instruction were of equivalent effect, we think it was not an invasion of the province of the jury to say so.

The question then is, whether the facts enumerated in the instruction were sufficient, as a manifestation of the pledgor's election, to treat the sale as valid; and we think that they were. It is to be observed that the instruction does not put a case of mere silence on the part of the pledgor. It is possible that mere silence (irrespective of lapse of time) would not amount to an election or ratification. But here there was something more than silence. The instruction requires not only that there should be a failure to object, but also that he should have commenced to treat with the defendant for a portion of the property. If he did this with knowledge of his rights, we think it was sufficient. It was not necessary that the ratification should have a consideration or the elements necessary to make a new contract: *Hill v. Finigan*, 62 Cal. 439. In *Child v. Hugg*, 41 Id. 520, the pledgor, on being presented with an account of the sale, admitted its correctness, and "approved" of the sale, and promised to pay the balance due; and it was held that these things constituted a ratification. In *Treadwell v. Davis*, 34 Id. 605, 94 Am. Dec. 770, a pledge of property by one who had no right to do so was held to be ratified by the owner's saying, when informed of it, that "he was glad the arrangement had been made." In *Earle v. Grant*, 14 R. I. 229, after an invalid sale, the pledgor was present with the pledgee and the purchaser, and saw the purchaser pay a dollar to the pledgee, and joined with them in drinking in celebration of it; and it was held that these circumstances constituted a ratification. Possibly there would have been no ratification if the pledgor, while offering to buy the property, should protest against the sale, although offering to buy it for the sake of peace. But that question does not arise; for the instruction requires not only that the pledgor should have commenced to treat for the purchase, but also that he should have "made no objection" to the sale.

It remains to be considered whether the pledgor's knowl-

edge of the law should have been enumerated as one of the elements of the ratification. There certainly are decisions which hold that knowledge of the law is essential to a ratification. See *King v. Lagrange*, 50 Cal. 332; *Cockerell v. Cholmeley*, 1 Russ. & M. 425. And for the purposes of this case we shall assume, without deciding, that knowledge of the law was necessary. But there is nothing in the record to show that the pledgor did not know the law, and the presumption is, that he did know it. Now, if the pledgor had expressly admitted at the trial that he did know the law at the time he commenced to treat for the purchase of the diamonds, it would seem to be clear that he would not have been injured by the failure to enumerate that element in the instruction; and we think that the unrebutted presumption has, for this purpose, the same force as an admission.

3. It is urged that the court erred in giving the following instructions, viz.: "A conversion of personal property takes place whenever one person assumes the ownership or control of another's property in contravention and against the rights of such other person, and against his consent. That may be implied." "And if the jury find, from the evidence, that, on the day when plaintiff was served with the account of sale by the defendant, Finigan assumed the ownership and control of the property described in the complaint, and denied Hill's right or title to the same, and set up right or title himself, then you will find that the conversion of the property took place on said — day of June, 1878, or whatever day it was that the account of sale was rendered to him by Finigan, if you find the conversion took place at all." Two objections are made to these instructions, which we shall consider separately.

(a) It is said that they ignore the pledgor's right of election; that while it is true that the pledgor could have elected to treat the illegal sale as a conversion, yet that he did not do so, but elected to place the conversion at the time of the formal demand and refusal on the 7th of August. There are authorities which say that in case of a sale like the one involved here, where the pledgee is the purchaser, there is no conversion, unless the pledgor elects to treat it as such (see *Bryan v. Baldwin*, 52 N. Y. 235; *Jones on Pledges*, sec. 571), and for the purposes of this decision, we shall assume that such is the law. But if the pledgor's story is to be believed, he did elect to treat the sale as invalid at the time mentioned

in the instruction. He says that a day or so after the sale the pledgee gave him a statement of account, and that he then "told him I did not recognize that sale, and that he had no right to sell my stocks and diamonds, and that I did not approve of it," and that he refused to buy back the diamonds; and said: "I will make you give up those diamonds yet." This seems to us a complete disaffirmance of the sale; and it is so characterized by the appellant's counsel himself, for he said on the oral argument, with reference to the story of his client: "He swore that promptly on the presentation of this account . . . he repudiated the sale, and said he would make him give back his property. He disaffirmed it then. . . . He disaffirmed it right from the beginning." If he did elect to disaffirm, such election would be binding upon him. He could not, for the purpose of increasing the damages, afterwards disaffirm the disaffirmance, and elect to disaffirm again at a later date. His right to the highest damages depends, under our statute, upon his prosecuting the action with reasonable diligence, a provision which would have little meaning if he could move the initial point along to suit himself.

Now, without stopping to inquire whether the appellant can have a reversal because of the assumption or ignoring of a fact which he himself swore to upon the trial, and which his counsel now insists upon as the truth, we do not think there was any prejudicial error. The ignoring of the pledgor's election was in effect an assumption of its existence at the time specified in the instruction. The position of the appellant in this regard must be in effect that it ought to have been left to the jury to say whether or not there was an election to disaffirm at the time stated in the instruction; and that if it had been so left to them, they might have found (contrary to the sworn statement of appellant) that the election did not take place at that time; and that by ignoring it altogether the court in effect assumed that it did occur at the time specified in the instruction, and not on the 7th of August. But the assumption, in view of the conceded facts of the case, was in favor of the appellant. As has been stated, under the ground first considered, it is only by reason of the election to disaffirm, sworn to by the appellant, that the court could not declare, as a matter of law, that there had been unreasonable delay in making the election. If it had not been for that, the trial court could, and presumably would, have instructed the jury to render a verdict for the defendant on the ground of unreason-

able delay in making the election; and this would have ended the case, and rendered errors in other matters immaterial. In other words, it was only by reason of the fact assumed in the instruction that the appellant could get to the jury at all; and this being so, we think that the assumption of that fact was an assumption in his favor, and that he cannot complain of it.

(b) It is said that the judge improperly assumed a fact when he charged that "if the jury find, from the evidence, that on the day when plaintiff was served with the account of sale by the defendant, Finigan assumed," etc. The argument is, that this assumes that the plaintiff "was served with the account of sale by the defendant." But the plaintiff admits that he was served by the defendant with a statement of account. This fact is undisputed, and hence the appellant was not injured by its assumption. His counsel, who certainly has argued the case with zeal and ability, says that the instruction does not refer to the account above mentioned, but to another account which the defendant says he delivered to the plaintiff, but which the plaintiff denies that he received. We are by no means certain that this is the case, or that the jury so understood it. But assuming that the instruction refers to the latter account, there was nevertheless no injury; for the two accounts are, for all purposes which are material to the question in hand, substantially the same. The account which the plaintiff admits that he received from the defendant was received by him about the same time as the other; and it informed him (though in a more condensed mode) that the securities had been sold, the date of the sale, and the price they brought. This, with what he admits that the defendant told him at the time, was all that it was material for him to know. The foregoing disposes also of what is claimed to have been a similar assumption in another instruction.

4. It is argued that there was error in instructing the jury that the presumption as to the measure of damages established by section 3336 of the Civil Code is a disputable presumption. We do not find it necessary to determine this question. There was no evidence tending to rebut the presumption (unless the evidence going to defeat the plaintiff's claim altogether be considered such, in which view there was of course no injury), and no question relating to it was submitted to the jury. The instruction, therefore, was purely abstract; and in view of all the circumstances of the case, we do not see how it could have

mised the jury. The assignments as to the admissibility of evidence were not pressed at the oral argument, and we do not think they require special notice.

Upon the whole record, we see no prejudicial error, and the order appealed from is therefore affirmed.

PLEDGE. — For an exhaustive note on the law of pledges, see *Lockett v. Townsend*, 49 Am. Dec. 730-733; also *Robinson v. Hurley*, 79 Id. 500-506. If a bank holding bonds as collateral security sells them at public sale, and itself becomes the purchaser, no title passes by such sale, and the bank will be still considered as holding them under its original title as collateral security for the payment of the debt due to it from the owner of the bonds: *Bank of the Old Dominion v. Dubuque etc. R. R. Co.*, 8 Iowa, 277; 74 Am. Dec. 302. Pledges cannot purchase at his own sale, upon the same principle that a trustee cannot purchase at his sale: *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 262; 89 Am. Dec. 779, and note 791.

HARMLESS ERROR. — Instances of what is: See note to *Columbus etc. R'y v. Bridges*, ante, p. 64; *St. Louis etc. R'y Co. v. Mackie*, 71 Tex. 491; 10 Am. St. Rep. 766. Errors committed in favor of an intervenor, to whom no relief of any kind is finally granted, are without prejudice, and no ground for reversal on appeal: *Farmers' Bank v. Arthur*, 75 Iowa, 129. Where the party appealing has not been prejudiced by an erroneous instruction, the appellate court will not reverse the judgment: *Commonwealth v. Lucas*, 84 Va. 303; *Wager v. Barbour*, 84 Id. 419. An instruction which might have a broader meaning than was properly intended, but which did not in fact mislead the jury, is harmless to the appellant: *In re Burrell*, 77 Cal. 479. An order setting aside a former order, which has expired by its own terms, is of no effect, and hence no ground for reversal: *Blair v. Blair*, 74 Iowa, 311. The erroneous refusal to allow an amendment to the answer becomes harmless, if the defendant was allowed to introduce all the evidence which he could have introduced under the proposed amendment: *Southern Pacific R. R. Co. v. Purcell*, 77 Cal. 69. Where, on the trial, the plaintiff admits the falsity of certain allegations of his complaint, which were essential to his cause of action under every possible construction of the pleading, any error in the admission or rejection of evidence is harmless: *Turner v. White*, 77 Id. 392. A judgment sustained by the evidence and the findings of the appellate court will not be reversed on account of the giving of an instruction as to the measure of damages, when it clearly appears, from the evidence, that the jury were not misled by it: *Hamburg Amer. etc. Co. v. Gothman*, 127 Ill. 599. A judgment will not be reversed because a technical error has intervened, when it is apparent, from the whole record, that substantial justice has been done, or if, upon the facts, the same verdict must have been rendered if the error had not been committed: *Chicago City R'y Co. v. Duffin*, 126 Id. 100. A judgment will not be reversed because improper evidence may have been admitted upon trial, when it is apparent that the result must have been the same had it been excluded: *Bulkley v. Devine*, 127 Id. 407. Although instructions given in behalf of the plaintiffs state the defense broader than the issues and evidence, it will not work a reversal for plaintiff, unless the appellate court can see that injury has resulted to defendant from the error: *People's Fire Ins. Co. v. Pulver*, 127 Id. 247. Sustaining a demurrer to a special plea, if erroneous, is not a ground for reversal, when the record shows that the de-

fendant had the benefit of the same defense under other special pleas: *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; compare *Graham v. Woodall*, 86 Id. 313; *Brown v. Commercial Ins. Co.*, 86 Id. 189. The failure of the court to pass on objections to interrogatories, if erroneous, is error, but error without injury, when the record shows that the same objections were urged to the answers of the witness, and were then decided by the court: *Trammell v. Hudman*, 86 Id. 472. Where the record shows that the damages awarded by the jury were strictly compensatory, the court will not inquire into the correctness of charges as to the right to recover punitive damages, since, if erroneous, they could not have injured the defendant: *City of Eufaula v. Simmons*, 86 Id. 515. When the complaint contains the common counts and a defective special count, and the plaintiff establishes his right of recovery under the former as if the special count had been stricken out, while defendants have the full benefit of every defense which could have been made under the special count, the overruling of a demurrer to the special count is a harmless error: *Estalla v. Wilson*, 86 Id. 487; compare also the cases of *Fairfield v. Barrette*, 73 Wis. 463, and *Bryant v. Stainbrook*, 40 Kan. 356.

[IN BANK.]

TAPIA v. DEMARTINI.

[77 CALIFORNIA, 323.]

MORTGAGE TO SECURE FUTURE ADVANCES—PRIORITY OVER SUBSEQUENT ENCUMBRANCES BY MECHANICS' LIENS OR OTHERWISE.—Mortgage made in good faith to cover future advances of money or goods is valid, if properly recorded, as against subsequent encumbrancers by mechanics' liens or otherwise, except as to advances made after actual, as distinguished from record, notice of a subsequent encumbrance, although the mortgage does not disclose upon its face that it was given in part for future advances, if the amount of liability is expressly limited, and although the agreement for advances be not in writing.

PAROL TRUST IN MORTGAGE IS VALID—EVIDENCE OF TRUST IS ADMISSIBLE AS NOT VARYING WRITING.—Parol agreement that a mortgage shall be held in trust by the mortgagee, in part for his own benefit and in part for the benefit of another, is valid in California, a mortgage conveying no estate in, but creating a mere lien upon, the land; and evidence of such agreement does not vary the terms of the written instrument.

SUIT to dissolve a partnership. The opinion states the facts.

Smith and Ford, for the appellant.

B. Schlessinger and J. F. Ramage, for the respondents.

WORKS, J. Suit was brought by the plaintiff against certain of the defendants to dissolve a partnership alleged to exist between them in carrying on the business of mining, and to close up and adjust the partnership affairs. Subsequently,

numerous other parties, who claimed to hold liens against the property of the copartnership, were made defendants, and set up, by way of answer, their respective claims of liens, most of which were mechanics' liens, for labor performed on the mining property of the firm.

The defendants, Busch, Mooney, Castagnetto, and Sorocco, also filed their cross-complaint, alleging, in substance, that the plaintiff and the defendants, his copartners, on the first day of February, 1888, executed to said defendant Busch his promissory note for \$5,000, payable one year after date, with interest at the rate of six per cent per annum, and to secure the payment thereof executed to said defendant their mortgage on the real estate in controversy in this action; that at the time said note and mortgage were so executed, the mortgagors were indebted to said Busch and one Herringlake, his partner, in the sum of \$571.22, and to the defendant Mooney in the sum of \$1,425.14, and to the defendant Crowell in the sum of \$1,152.27; "that said note and mortgage were executed and delivered with the understanding and agreement among all the parties thereto, and said Mooney and Crowell, that the same were so executed and delivered to secure the payment of the several balances of account aforesaid then due said Busch and Herringlake, as copartners aforesaid, and said Mooney and Crowell respectively, and to secure further sums to become due for goods, wares, and merchandise, to be afterward sold and delivered, by said Mooney and Crowell respectively, to said mortgagors, not exceeding the sum agreed to be paid in said promissory note." It is further alleged that Mooney, under said agreement, furnished goods, wares, and merchandise to the amount of \$2,174.43, and the amounts due and unpaid to the respective parties are stated.

The recording of the mortgage, and the fact that, prior to the commencement of the suit, the said Crowell had sold, assigned, and delivered his account and all his rights under the mortgage to the defendants, Castagnetto and Sorocco, are alleged, and it is asked that Herringlake, partner of Busch, be made a party, and that the lien of certain of the defendants be declared subordinate to the claims under said mortgage, and the property sold to satisfy the said mortgage lien.

With the pleadings in this condition, it was stipulated, by all the parties in interest, that a decree might be entered dissolving the partnership, and ordering the sale of the property and the payment of the proceeds of the sale into court, to be

applied on the respective claims of the parties, according to their priority, to be determined by the court thereafter. The decree was entered, the property sold, and the proceeds paid into court.

The court below, in adjusting the liens, held that, as between the defendant Mooney and the other lien-holders, the mortgage held by Busch created no lien in his favor, and the final decree was rendered accordingly.

The defendant Mooney alone appeals to this court.

Three questions are presented for our consideration:—

1. Was the mortgage executed to Busch valid, as against subsequent encumbrances, for future advancements?

2. Was such mortgage a valid and effective lien in favor of Mooney, he not being named as a mortgagee, or mentioned therein, and no trust in Busch, for his benefit, being declared in writing?

3. If the mortgage was valid for any purpose in favor of Mooney, was it binding as between him and subsequent encumbrancers, as to future sales of goods and merchandise, under the parol agreement for advances under the mortgage?

1. It is firmly settled by a long line of decisions that a mortgage, made in good faith to cover future advancements or indorsements, is valid, not only as between the immediate parties to the instrument, but as against subsequent purchasers or encumbrancers, if properly recorded: Civ. Code, sec. 2884; *Tully v. Harloe*, 35 Cal. 302, 309; 95 Am. Dec. 102; *Ackerman v. Hunsicker*, 85 N. Y. 46; 39 Am. Rep. 621; *Googins v. Gilmore*, 47 Me. 13; 74 Am. Dec. 472; *Morris v. Cain*, 39 La. Ann. 712; 1 Jones on Mortgages, secs. 373, 374; *Shirras v. Caig*, 7 Cranch, 34; *McDaniels v. Colvin*, 16 Vt. 300; 42 Am. Dec. 512; *Ward v. Cooke*, 17 N. J. Eq. 93, 99; 3 Pomeroy's Eq. Jur., secs. 1197, 1198.

The mortgage under consideration is in the ordinary form, and does not disclose upon its face that it is given in part for future advancements. While it is better and more consistent with open and fair dealing that the mortgage should express its object, this is held not to be necessary to its validity if the amount of liability to be incurred under it is expressly limited: *Tully v. Harloe*, *supra*; *Morris v. Cain*, *supra*; *Lawrence v. Lucker*, 64 U. S. 14, 26; 1 Jones on Mortgages, sec. 374; *Shirras v. Caig*, *supra*; *Maroney's Appeal*, 24 Pa. St. 372; *Witozinski v. Everman*, 51 Miss. 841.

Nor is it necessary that the agreement under which ad-

vances are to be made shall be in writing: 1 Jones on Mortgages, sec. 351.

The mortgage, as against subsequent encumbrancers, becomes a lien for the whole sum advanced from the time of its execution, and not for each separate amount advanced from the time of such advancement, although the right to enforce the collection thereof can only arise upon each advancement being made: *Ackerman v. Hunsicker*, 85 N. Y. 43, 49; 39 Am. Rep. 621; *Shirras v. Caig*, 7 Cranch, 34; *Maroney's Appeal*, 24 Pa. St. 372.

But the lien of the mortgage cannot be enforced as against subsequent encumbrances, of which the mortgagee has actual notice, for advancements or indorsements made or given after such notice. The notice must be actual. Constructive notice, by the recording of subsequent encumbrances, is not enough: *Ackerman v. Hunsicker*, 85 N. Y. 52; 39 Am. Rep. 621; *Ward v. Cooke*, 17 N. J. Eq. 93, 99; *Shirras v. Caig*, 7 Cranch, 34; 1 Jones on Mortgages, sec. 372; 3 Pomeroy's Eq. Jur., sec. 1199.

It is immaterial whether the advances are to be made in money or materials: *Brooks v. Lester*, 36 Md. 65.

If the mortgage discloses upon its face that it is to stand as security for future advancements, the amount of the advances to be made need not be set out. It is sufficiently definite to put subsequent encumbrancers on inquiry, and they must ascertain the extent of the lien, or suffer the consequences: *Lovell v. Webb*, 62 Ala. 271; *Witozinski v. Everman*, 51 Miss. 841, 845.

The rules thus established apply to mechanics' liens: Phillips on Mechanics' Liens, sec. 236.

We are fully in accord with the doctrines laid down in the cases cited. They seem to us to be eminently just and equitable. Applying them to this case, the mortgage under which the appellant claims was of record, and was notice to subsequent encumbrancers that it constituted a lien upon the property to the full sum of five thousand dollars. They performed labor on the property with full notice of the existence of a lien to that amount. If they had desired to do so, they might have ascertained the actual condition of the security, and by notice to the holder of the mortgage have prevented any additional encumbrance of the property for further advancements, by giving notice of their liens. Not having done so, their rights must be held to be subject to the mortgage, to the full amount of the advancements shown to have been made.

2. We pass to the question whether the execution of the mortgage to Busch, under a parol agreement between all of the parties in interest that it should be held in part for the benefit of the appellant, was valid and binding as against the respondents.

As we understand the position of counsel for respondents, they contend:—

1. That the agreement by which Busch was to hold the mortgage for the benefit of the appellant had the effect to change the written contract between the mortgagor and mortgagee, and, being in parol, was not binding under section 1698 of the Civil Code.

2. That the oral arrangement, if valid, must have been executed within a year under section 1624 of the Civil Code.

3. That it amounts to a declaration of an express trust in lands, and cannot rest in parol.

The question presented is not a new one. The decided cases are clearly to the effect that such an agreement as the one under consideration is valid and binding upon the parties. In this state a mortgage conveys no estate in the land, but is a simple lien upon the property.

This being true, a transaction of this kind is not within the provisions of the code that an express trust in lands cannot be created except by an agreement in writing, or a parol agreement fully executed. Being but a personal chattel, "a parol trust may attach to a mortgage that the mortgagee shall hold it in trust for his own benefit, and in part for the benefit of another": 1 Jones on Mortgages, secs. 376, 846; *Hubbell v. Blakeslee*, 71 N. Y. 63, 69; *Wood v. Weimer*, 104 U. S. 786; *Hall v. Crouse*, 13 Hun, 557; 1 Pomeroy's Eq. Jur., sec. 74; 2 Id., sec. 1181.

The proof of such an agreement does not vary the terms of the written instrument: 1 Jones on Mortgages, sec. 376.

It is not claimed that the transaction here was fraudulent. On the contrary, the case is presented with the express understanding that the agreement was made in good faith, and that the advancements were made by appellant in pursuance thereof, as set forth in the cross-complaint. We have no doubt of the validity or binding effect of the parol contract made between these parties. Its enforcement as against the subsequent encumbrancers can work them no injustice. It can make no difference to them whether the mortgage is enforced in favor of Busch or the appellant. They had notice

of the amount of the lien, which was the material question for them.

As to the claim made by appellant that the contract, being in parol, must be performed within one year, it is sufficient to say that it is the written contract—the mortgage—that is to be performed. The parol agreement can only have the effect to explain the object of the mortgage, and determine for whose benefit it may be enforced.

3. If we are correct in the conclusions we have reached upon the first two questions presented by the briefs, it must follow, as a necessary consequence, that the mortgage executed to Busch for the benefit in part of the appellant was valid and binding in his favor as against the respondents for the amount due him for advancements made thereunder.

It is not claimed that the appellant had actual notice of the liens of the respondents at the time he made the advancements, and it is conceded that as there is no dispute as to the facts, a new trial is unnecessary.

The judgment appealed from is reversed, with instructions to the court below to so modify the same as to give the lien of said mortgage, to the extent of the amount due the appellant, priority over all liens of respondents for work done or materials furnished subsequent to the execution of said mortgage.

MORTGAGES FOR FUTURE ADVANCES. — A mortgage given in good faith to secure future advances is a good and valid security; and such mortgage need not express its object upon its face, though it would be better if it did: *Tully v. Harloe*, 35 Cal. 302; 95 Am. Dec. 102, and note 107. As to the validity in general of mortgages for future advances, see *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472, and note 475. A mortgage to secure what mortgagor "may owe on book" to the mortgagee is a mortgage to secure future indebtedness, especially where no book account exists at the time, and is valid, if recorded, as against subsequent mortgagees, and covers book debts contracted after the making of the subsequent mortgage, but before actual notice to the prior mortgagees to make no further advances: *McDaniels v. Colvin*, 16 Vt. 200; 42 Am. Dec. 512, and note 517. A mortgage to secure future indorsements, when it has been duly recorded, has preference over a judgment subsequently entered against the mortgagor, whether such indorsement was made before or after the entry of the judgment: *Ackerman v. Hunsicker*, 85 N. Y. 43; 39 Am. Rep. 621.

PAROL AND RESULTING TRUSTS. — Circumstances under which such trusts may arise, and instances of: *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and note 530; *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242, and note 245.

COWAN v. CREDITORS.

[77 CALIFORNIA, 401.]

PARTNERSHIP PROPERTY IS NOT EXEMPT FROM EXECUTION, and therefore subject to be set apart for the use of the partners in insolvency proceedings, although it is such property as would be exempt if one partner were the sole owner.

INSOLVENCY proceedings. The opinion states the facts.

J. H. Campbell, for the appellants.

T. H. Laine and C. D. Wright, for the respondents.

BELCHER, C. C. W. W. Cowan and Thomas Scott were partners engaged in the business of farming and fruit-raising in the county of Santa Clara. In September, 1885, they filed in the superior court of that county a petition, asking to be adjudged insolvents, and discharged from their debts. All of the property mentioned and described in the petition and schedule was partnership property, used in carrying on the business of the firm, and all the debts were partnership liabilities. In due time each of the petitioners applied to the court to have certain parts of the property set apart for his use and benefit, on the ground that such parts were by law exempt from execution. Subsequently, Scott withdrew his petition, and after a hearing the court denied the petition of Cowan, upon the ground that he "was not entitled to have any part of the property claimed by him, and heretofore described by him, set apart to him, for the reason that the whole thereof is partnership property, and therefore not exempt by law from execution." Cowan appealed from the order, and the only question is, Was the court right in its conclusion as to the law applicable to the matter?

Section 690 of the Code of Civil Procedure provides for the exemption from execution of property belonging to a judgment debtor, and names the kinds and amount of property which shall be treated as exempt.

Section 35 of the Insolvent Act of 1880 provides that two or more persons who are partners in business may be adjudged insolvent, "in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be exempt by law." And section 60 of the act declares that "it shall be the duty of the court having juris-

diction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution."

If the petitioner had been the sole owner of the property in question, there can be no doubt that it would have been exempt from execution, and the duty of the court to set it apart for his use and benefit. Did the fact that it was partnership property change the rule in this regard, and make it subject to seizure and sale by creditors?

The authorities upon the question are sharply conflicting, and a majority of the cases hold that partnership property is not exempt: See Thompson on Homesteads and Exemptions, secs. 194-216, where the cases are very fully collected and reviewed. See also Freeman on Executions, 2d ed., sec. 221.

The leading case in favor of the proposition that partnership property is exempt is *Stewart v. Brown*, 37 N. Y. 350; 93 Am. Dec. 578. In that case a pair of horses and their harness, which were partnership property, had been taken under an execution, and the court said: "If the partners have such an ownership as subjects the property to seizure on execution, they have also such an ownership as entitles them to claim its exemption in a case plainly falling within the terms and intent of the statute. . . . If each of the respondents had owned a pair of horses, both teams would have been exempt upon the state of facts found by the referee. It would be an obvious perversion of the statute to hold that the plaintiffs forfeited its protection by owning but a single team between them, used for the common support of both. The language of the statute should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest it assumes to protect is that belonging to the debtor, be it more or less. The ownership of the team may be joint or several; it may be limited or absolute. Whatever it be, within the limitations of the statute, the debtor's interest is exempt, in view of his own necessity and of the probable destitution to which its loss might reduce a family dependent on him for support." And see *Skinner v. Shannon*, 44 Mich. 86; 38 Am. Rep. 232; *McCoy v. Brennan*, 61 Mich. 362; *Burns v. Harris*, 67 N. C. 140; *Evans v. Bryan*, 95 Id. 174; 59 Am. Rep. 233; *Blanchard v. Paschal*, 68 Ga. 32; 45 Am. Rep. 474.

On the other side the leading case seems to be *Pond v. Kimball*, 101 Mass. 105. In that case the court said: "We agree

with plaintiff's counsel that the statute is humane and beneficial in its purpose and operation, and fairly entitled to as liberal a construction as can be given it consistently with its true and just interpretation. There are many difficulties in the way of applying it to the case of copartners and joint owners, and these difficulties we find to be insuperable. Property purchased with the joint funds of the firm, and constituting a portion of its capital, must necessarily be subject to all the incidents of partnership property. On the decease of one member of the firm, it would go to the surviving member, and he would have a right to hold it, to be used in settling the affairs of the concern and paying its debts. In the case of numerous partners, can it be said that each would have the right to claim, as exempt from attachment for the joint debts, one hundred dollars' worth of material and stock? or is the whole firm to be considered as one debtor only? Does the exempted property in that case belong to the partners jointly? or does each take a separate share? It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless, possibly, the clause as to fishermen be an exception. Its apparent object is to secure to the debtor the means of supporting himself and his family by following his trade or handicraft with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessities out of his property. But property belonging to the firm cannot be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his accounts with the firm. The exemption, in our opinion, is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only. If he desires to form a partnership and combine his means with those of one or more than one other person, he must take the precaution to retain exclusive ownership of his tools and implements, allowing the use of them to his associates, or he will lose entirely the benefit of the statutory exemptions as to that kind of property." And see *Gay-*

lord v. Imhoff, 26 Ohio St. 317; 20 Am. Rep. 762; *Guptil v. McFee*, 9 Kan. 30; *Spiro v. Paxton*, 3 Lea, 75; 31 Am. Rep. 630; *Gill v. Latterman*, 9 Lea, 381; *White v. Heffner*, 30 La. Ann., pt. 2, p. 1280; 31 Am. Rep. 238; *Giovanni v. First Nat. Bank*, 55 Ala. 305; 28 Am. Rep. 723; *Baker v. Sheehan*, 29 Minn. 235; *State v. Spencer*, 64 Mo. 350; 27 Am. Rep. 244; *Bonsall v. Comly*, 44 Pa. St. 442.

Without discussing the question further, it is enough under all the circumstances to say that we think the rule which is supported by the great preponderance of authority the safer and better one, and we therefore advise that the order appealed from be affirmed.

FOOTE, C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

PARTNERSHIP PROPERTY — EXEMPTIONS. — Partnership property is not exempt from execution before division and settlement of the partnership affairs: *Spiro v. Paxton*, 3 Lea, 75; 31 Am. Rep. 630; *Wise v. Frey*, 7 Neb. 134; 29 Am. Rep. 380; *White v. Heffner*, 30 La. Ann. 1280; 31 Am. Rep. 238. During the continuance of a partnership, the individual members cannot claim several exemption of undivided partnership property taken under legal process for partnership debts: *Giovanni v. First Nat. Bank*, 55 Ala. 305; 28 Am. Rep. 723; *State v. Spencer*, 64 Mo. 355; 27 Am. Rep. 244, and note 246. Members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions: *Gaylord v. Imhoff*, 26 Ohio St. 317; 20 Am. Rep. 762; *Russell v. Leeson*, 39 Wis. 570; 20 Am. Rep. 60. But the contrary rule has been held in Michigan, Georgia, North Carolina, and New York: *Skinner v. Shannon*, 44 Mich. 86; 38 Am. Rep. 232; *Blanchard v. Paschal*, 68 Ga. 32; 45 Am. Rep. 474; *Evans v. Bryan*, 95 N. C. 174; 59 Am. Rep. 233; *Stewart v. Brown*, 37 N. Y. 350; 93 Am. Dec. 578, and note 579.

[IN BANK.]

ROBINSON v. DUNN.

[77 CALIFORNIA, 478.]

LEGISLATURE — COMPENSATION OF EMPLOYEES — MEANING OF WORD "DAY."

— Compensation of the porters of the senate of California is fixed at four dollars per day by section 268 of the Political Code; and the word "day," as used in the section, covers whatever portion of the twenty-four hours the senate chooses to remain in session.

LEGISLATURE — GIFTS TO EMPLOYEES — COMPENSATION AFTER SERVICE

RENDERED. — Legislature of California has no power, under the state constitution, to make gifts to its employees, or to allow them extra compensation after service rendered.

MANDAMUS. The facts are stated in the opinion.

Attorney-General Johnson and D. M. Delmas, for the appellant.

James C. Cary and J. D. Sullivan, for the respondent.

HAYNE, C. Appeal by the defendant from a judgment commanding him to draw his warrant in favor of the plaintiff for the sum of sixty dollars. The plaintiff was porter of the senate during the session of 1885, and bases his claim upon the following resolution of that body, viz.: —

“Whereas, during the present session of the legislature the senate has been in session during a period of several weeks from eleven o'clock, A. M., to eleven o'clock, P. M., thus entailing extra work, amounting to sixteen hours upon the porters, pages, watchmen, gate-keepers, mail-carrier, and the mailing clerk, —

“Resolved, That the pages, porters, watchmen, gate-keepers, mail-carrier, and the mailing clerk be and they are hereby allowed one dollar per day for extra services for the session, and the controller is hereby authorized and directed to draw his warrants in the sum of sixty dollars for each of the above enumerated employees, payable out of the contingent fund of the senate.”

This resolution is alleged in the complaint to have been passed a few days before the end of the session. And from this fact and from its language it is apparent that the compensation was for services which had been already rendered. The idea upon which the resolution rests is, that the services were “extra,” or in other words, something outside of the regular duties of the employment. And since it is not pretended that the services were different in kind from the regular duties, they are “extra” because they were for a longer time than seems to have been considered usual. But the compensation of the porters is fixed by law at “four dollars per day”: Pol. Code, sec. 268. They are not paid by the amount of work which they do, but by the day. And we think it too clear for discussion that the word “day,” as used in the statute, covers whatever period of the twenty-four hours the legislators choose to remain in session. The language of the law fixing the compensation of the employees is similar to that fixing the compensation of the legislators themselves, who are allowed “eight dollars per day.” And it would be as reasonable to say that extra compensation should be made for a long ses-

sion in the one case as in the other. The services, therefore, were not "extra," but were such as the employees were bound to render. And this being the case, the sum voted to them must either have been a gift or extra compensation "after service has been rendered," both of which are expressly forbidden by the constitution: See secs. 31 and 32 of art. 4.

This view of the case renders it unnecessary to express any opinion as to whether the legislature has in any case power to recognize a merely moral claim.

We therefore advise that the judgment be reversed, with directions to dismiss the proceedings.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to dismiss the proceedings.

"COMPENSATION OF OTHER OFFICERS AND EMPLOYEES. — There must be paid to the secretary . . . of the senate, and the chief clerk . . . of the assembly, each eight dollars per day; to the assistant sergeant-at-arms of the senate and assembly, each six dollars per day; to the porters of the senate and assembly, each four dollars per day; to each committee clerk appointed by authority of either house, five dollars per day," etc.: Cal. Pol. Code, sec. 266.

[IN BANK.]

WILSON v. ATKINSON.

[77 CALIFORNIA, 485.]

ADVERSE POSSESSION — STATUTE OF LIMITATIONS — VOID TAX DEED — COLOR OF TITLE. — Tax deed void on its face, but containing a proper description of the land, is sufficient to give color of title under which a claimant of title in good faith may found an adverse possession so as to set the statute of limitations in motion. It is a "written instrument" upon which a claim of title may be founded as being "a conveyance of the property in question," within the meaning of section 322 of the California Code of Civil Procedure, and is effective as notice of the extent of the possession and claim under it.

ADVERSE POSSESSION — STATUTE OF LIMITATIONS — VOID DEED — CLAIM OF TITLE IN GOOD FAITH. — Adverse occupant must enter and hold the land in good faith, believing his conveyance to be valid, in order to begin an adverse possession under a claim of title, within the meaning of section 322 of the California Code of Civil Procedure, providing that such occupant must found such claim "upon a written instrument as being a conveyance of the property in question." Knowledge that the instrument is void will vitiate the claim of title; but such knowledge must be actual, and not such as would arise from the legal construction of the instrument.

ADVERSE POSSESSION — STATUTE OF LIMITATIONS — VOID TAX DEED ADMISSIBLE IN EVIDENCE TO DEFINE CHARACTER AND LIMIT EXTENT OF POSSESSION. — Void tax deed is admissible in evidence, in an action of ejectment, for the purpose of defining the character and limiting the extent of the defendant's possession, when the evidence shows that the defendant entered and held possession of the land under the deed, claiming to be the owner of the property by reason of the conveyance, and that the plaintiff had actual notice of the adverse claim and its foundation.

ACTION of ejectment. The facts are stated in the opinion.

C. A. and F. P. Tuttle, for the appellant.

Hale and Craig, for the respondent.

WORKS, J. Action of ejectment. Trial by jury. Verdict and judgment for defendant. The plaintiff proved title from the United States government, and that at the time the action was commenced, the defendant was in possession of the property.

The defendant, to sustain the issues on her behalf, introduced a tax deed to one Singer, bearing date September 3, 1875, and a bargain and sale deed from Singer to her. There was evidence tending to show that Singer had claimed title under the tax deed from the time of its execution, and that he had notified the plaintiff of the fact that he held the tax deed, and that he claimed title under it soon after its execution. There is also evidence that Singer leased the land to other parties to be used as pasture for stock for the years 1876 to 1882, inclusive, except the year 1879, and that all taxes were paid by him from the time of receiving the deed. The deed from Singer to the defendant bears date May 11, 1883. The land is shown to have been fenced early in 1880. The only evidence of possession before that is, that the land was used for the purpose of pasturing sheep and other stock, but it tends to show that such possession was exclusive, the stock being herded on the land and the stock of others kept off.

The tax deed above referred to was held to be void when this case was here before: *Wilson v. Atkinson*, 68 Cal. 590. The plaintiff objected to the admission of this deed in evidence, on the ground that it was void and passed no title, and was irrelevant, did not give color of title, and was not sufficient to set the statute of limitations in motion, or to show possession under it. The objection was overruled, the defendant admitting that the deed was not sufficient to prove title, but contending that it was competent, as tending, in connec-

tion with the parol testimony, to show the character and extent of the possession.

There is much diversity of opinion in the decided cases upon the question whether a deed void on its face is such a written instrument as will uphold and render effective the possession of real estate that would otherwise fail to give title.

It has been held by this court, in a number of cases, that a tax deed like this, containing the recital that the land was assessed to "unknown owners, and to all owners and claimants known and unknown," is void, and appears to be so on its face: *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Id. 365; *Wilson v. Atkinson*, 68 Id. 590.

The code provides: "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, . . . and that there has been a continued occupation and possession of the property included in such instrument, . . . or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely": Code Civ. Proc., sec. 322.

The deed in question was a written instrument, purporting to convey the real estate in controversy by a proper description. It is properly executed, and there is evidence tending to show that the defendant and her grantor claimed title under it as being a conveyance of the property. In some of the cases it is said that the conveyance must be good in form, contain a description of and profess to convey the property, and that containing these requirements it will give color of title, although in fact invalid and insufficient to pass the title, or actually void or voidable: *Packard v. Moss*, 68 Cal. 123-127, and cases cited.

To sustain their contention that the deed, being void on its face, could not put the statute of limitations in motion, counsel for appellants cite the following authorities: *Packard v. Moss*, 68 Cal. 127, 128; *Moore v. Brown*, 11 How. 414, 425; *Skyle v. King*, 2 A. K. Marsh. 385; *Walker v. Turner*, 9 Wheat. 542; *Shoot v. Walker*, 6 Kan. 65; *Cain v. Hunt*, 41 Ind. 466; 26 Am. Law Reg. 409, 416.

We have given these authorities our careful attention. They are in the main based upon statutory provisions differing

materially from our own, but in principle support the appellant's position. Many others cases to the same effect might have been cited. The decided cases are so conflicting as to aid us very little in attempting to arrive at a proper conclusion, but the reasoning by which the courts of the several states have supported the doctrines laid down are worthy of careful consideration.

The case of *Moore v. Brown, supra*, was founded upon a statute of limitations of the state of Illinois which applied to persons "having a connected title in law or equity, . . . from any public officer or other person authorized by the laws of the state to sell such land for the non-payment of taxes, and who had held possession thereunder for seven years." The deed showed upon its face that the auditor sold the land short of the time provided by law. It was held that the deed disclosed the fact that the officer was not "authorized by the laws of the state to sell the land," that the purchaser must take notice of the fact appearing on the face of his deed, and his holding could not be regarded as adverse.

Chief Justice Taney and justices Catron and Grier dissented, and gave their reasons. This case reviews the case of *Skyle v. King*, cited by counsel. It was based upon a statute almost identical with the Illinois statute above referred to.

The case of *Shoat v. Walker, supra*, rested upon similar grounds. The deed showed upon its face that the property was sold for taxes to the county of Lyon, and that the certificate of sale was assigned by the county treasurer to one Howard, and the tax deed executed to him. It was held that there was no law authorizing the treasurer to make such assignment, but that it must be done by the county clerk. The case did not involve the question of adverse possession, as it was conceded that there had been no actual possession, and that the land was wild and uncultivated. The decision was based upon *Moore v. Brown, supra*, and *Lain v. Shepardson*, 18 Wis. 59, in which it was held that the statute of limitations did not run under a tax deed void on its face, where there had been no actual possession.

The other cases cited by counsel do not materially aid them, and need not be specially noticed.

In the article in 26 Am. Law Reg. 409, by Mr. Black, entitled "Color of Title," the authorities are carefully reviewed, and the conclusion reached that their weight is against the position of appellant in this case.

Color of title is that which in appearance is title, but which in reality is no title: *Wright v. Mattison*, 18 How. 54.

In the case of *Veal v. Robinson*, 70 Ga. 816, it was held that "color of title is anything in writing purporting to convey title to land, which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title."

In *Brooks v. Bruyn*, 35 Ill. 394, it is said: "Any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title; it passes only color or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title because the grantor had none to convey, or had no authority, in law or in fact, to convey one, or whether such want of authority appears on the face of the instrument, or *aliunde*. The instrument fails to pass an absolute title, for the reason that the grantor was not possessed of some one or more of these requisites, and therefore it gives the semblance or color only of what its effect would be if they were not wanting."

The supreme court of Wisconsin says in *Oconto Company v. Jerrard*, 46 Wis. 317: "When municipalities or their taxing officers assume to levy a tax or to institute a tax proceeding not authorized by statute, they are outside of their functions, and are not acting *virtute officii*. They are not in the exercise of the sovereign power of taxation, and are as powerless to tax as private persons. Their whole proceeding is a mere usurpation, and absolutely void throughout for all purposes. In such a case there is nothing for the statute of limitations to act upon. But when there is statutory authority within the scope of the constitution to raise money by taxation from property subject to taxation, to come into the public treasury for public use, and there is an actual attempt under color of law to exercise the authority, it is, while *in fieri*, *prima facie* a valid tax proceeding; and when the statute of limitations has run upon it, it is conclusively established as a valid exercise of the taxing power."

The statute of Wisconsin is in almost, if not quite, the exact language of our own, and the supreme court of that state has held in a number of cases that a tax deed void upon its face is a written instrument within its meaning: *McMillan v. Wehle*, 35 Wis. 685, 693, and cases cited.

As further supporting this doctrine, we cite *Leffingwell v. Warren*, 2 Black, 599; *Pugh v. Youngblood*, 69 Ala. 296; *Gatling v. Lane*, 17 Neb. 77; *Dalton v. Lucas*, 63 Ill. 337; *Stovall v. Fowler*, 72 Ala. 77; *Pillow v. Roberts*, 13 How. 472, 476; Wood on Limitation of Actions, 522, 536.

In *Pillow v. Roberts*, *supra*, the court uses this language: "Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself upon any pretense or color of title, is equally protected with the forcible disseisor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend why evidence offered and competent to prove that fact should be rejected till the fact is otherwise proven."

In the case of *Packard v. Moss*, 68 Cal. 123, cited by counsel for appellant, the authorities were cited and reviewed to some extent. The deed before the court in that case was not void upon its face, but was founded upon a void judgment. The court said: "At least it is not urged that the sheriff's deed is in other than the usual form. As a foundation of title, it is worthless by reason of the void judgment in which it had its inception. We are not, however, considering it as a medium for the conveyance of title. An adverse claimant of land is a wrong-doer, and as such is treated and known to the law, until, by a lapse of years, his acts, before tortious, are consecrated by time and dignified as lawful. A deed which

gives color of title simply measures and fixes the limit, the extent of a wrongful possession, and while it continues wrongful, may be used against the wrong-doer as evidence of the extent of his wrongful possession; and when by five years' acquiescence the wrongful acts of possession came to be recognized as lawful, the deed, which before fixed the extent of the wrong, stands as a land-mark to bound the right acquired. Before, it defined the limits to which an unlawful possession extended. After five years of adverse possession, the occupancy having become valid, the boundaries which before marked the wrongful possession remain as indices of the extent of the right."

The deed we are now considering, although it contained a recital showing that the assessment under which the tax sale was made was invalid, contains all the other requisites of a good and valid deed, including a sufficient description of the land claiming under it. It was just as effective as notice of the extent of the defendant's possession and claim as if the objectionable recital had been omitted.

There are cases holding that, in order to avail himself of the benefits of the statute of limitations, the adverse occupant must enter and hold the land in good faith, believing his conveyance to be valid: *Nieto v. Carpenter*, 21 Cal. 455, 490; *Waterhouse v. Martin*, Peck, 392; *Saxton v. Hunt*, 20 N. J. L. 487; *Davidson v. Coombs*, 18 Rep. (Ky.) 15; 26 Am. Law Reg. 418. But see *Wood on Limitation*, 530, 531.

This is, no doubt, the meaning of the provision of the code, that he must enter into possession under claim of title, founding such claim upon a written instrument as being a conveyance of the property: *McCracken v. City of San Francisco*, 16 Cal. 591, 636; *Walsh v. Hill*, 38 Id. 481, 488; *Wolfskill v. Malajovich*, 39 Id. 276, 280.

It could not be justly said that a party was founding his claim upon a written instrument, as being a conveyance, when he knew the instrument to be absolutely void. The code should be construed as requiring the claim of title to be made in good faith, believing the deed to be a conveyance of the property. But the knowledge of the true character of the instrument by the occupant must be actual, and not such as would arise from the legal construction of the instrument. To give the statute any other construction would deprive it of much of its force.

There are decisions of this court holding that a deed made in violation of law, and so appearing on its face, cannot give color of title: *Sunol v. Hepburn*, 1 Cal. 254, 280; *Woodworth v. Fulton*, 1 Id. 295; *Bernal v. Gleim*, 33 Id. 668.

So it has been held in the earlier cases that a deed, to give color of title, must *prima facie* give a good title: *Bernal v. Gleim*, 33 Cal. 668, 676.

But the earlier cases holding that a deed void upon its face could not aid the adverse possession of the occupant were based upon the peculiar language of the Spanish law, and are of but little weight in determining what should be the rule under the present code provision. Besides, in one, at least, of the cases the deed was one expressly prohibited by law. So far as the cases hold that a void deed, which does not appear on its face to be such, cannot give color of title, they are overruled by later cases: *Packard v. Moss*, 68 Cal. 123.

The deed we are considering was not prohibited by law, and the officer who executed the deed was authorized to do so by the laws of this state. The only objection to it is, that it shows that the legal steps necessary to authorize a sale of the property were not taken. The defect was not one which would be readily detected. Whether such a deed was in fact void has been a matter of grave question, but is now settled by the decided cases.

The parol evidence in the case sufficiently shows that the holder of the deed entered and held possession of the land under it, claiming to be the owner of the property by reason of the conveyance, and that the plaintiff had actual notice of the adverse claim and its foundation.

We are clear that, under the circumstances of this case, the deed was properly admitted in evidence, for the purpose of defining the character and limiting the extent of the defendant's possession: See dissenting opinion of Mr. Justice McKee, in *Wilson v. Atkinson*, 68 Cal. 592.

Certain instructions were asked by appellant and refused. They proceeded upon the theory, either expressed or assumed, that the tax deed above referred to was not sufficient to give color of title, and for that reason, if for no other, were properly refused.

There are other questions presented by the appellant's brief, but they do not call for special notice.

The judgment and order denying a new trial are affirmed.

ADVERSE POSSESSION SUFFICIENT TO DEFEAT A RIGHT OF ACTION OF THE HOLDER OF THE LEGAL TITLE must be hostile in its inception, and be continued as such, without interruption, for the statutory period. It must be actual, visible, exclusive, acquired and retained under claim of title inconsistent with that of the true owner; but it need not be under a rightful claim, nor even under a muniment of title: *Illinois Central R. R. Co. v. Houghton*, 126 Ill. 233; 9 Am. St. Rep. 581, and note 586. Title to realty acquired by open, uninterrupted, exclusive, and adverse possession, under claim of ownership, for more than twenty years, will defeat an action in ejectment by the holder of the paper title: *Riggs v. Riley*, 113 Ind. 208. Where plaintiff, to maintain his action to recover a tract of land, relies upon seven years' adverse possession under color of title, he must show that such possession was continuous and unbroken for the full period prescribed by the statute of limitations: *Scott v. Mills*, 49 Ark. 266. Prior to the amendment of 1878 to section 325 of the Code of Civil Procedure, one who, in good faith, entered into possession of real estate, claiming title thereto under a void tax deed, and under such claim of title, openly, notoriously, and visibly maintained the possession thereof for a sufficient length of time adversely as against the whole world, including the owner of the paper title, acquired title to the land by adverse possession: *Reynolds v. Lincoln*, 73 Cal. 191. And whether one claiming title by adverse occupancy had that kind of continuous, notorious, and hostile possession of the land in dispute as would give title under the statute of limitations, is a question of fact for the jury: *Mason v. Ammon*, 117 Pa. St. 127.

[IN BANK.]

BEDELL v. HERRING.

[77 CALIFORNIA, 572.]

PROMISSORY NOTE—MAKER SIGNING NOTE WITHOUT KNOWING ITS CONTENTS—BONA FIDE INDORSEE FOR VALUE AND BEFORE MATURITY. — Maker of a promissory note who signs the same without knowing its contents, because he cannot read or write, and relying on false representations by the payee that it was a mere memorandum of agency, is guilty of such carelessness and undue confidence that, as between himself and an indorsee in good faith for value and before maturity, he must bear the loss and pay the note.

PROMISSORY NOTE—FRAUD IS NO DEFENSE AGAINST BONA FIDE INDORSEE FOR VALUE AND BEFORE MATURITY. — Maker of a promissory note cannot defend, it seems, on the ground that the note was procured from him by fraud, as against an indorsee in good faith for value and before maturity.

ACTION on a promissory note. The facts are stated in the opinion.

M. E. Sanborn, for the appellant.

John T. Harrington, for the respondent.

McFARLAND, J. This is an action upon a promissory note for five hundred dollars, made by defendant, payable to the order of E. Jones, due in six months, and by the latter indorsed and delivered to plaintiff before maturity. Judgment went for plaintiff, and defendant appeals. The appeal is from the judgment, and upon the judgment roll alone. The defense relied on was, that said payee Jones procured defendant to sign the note by falsely and fraudulently representing that it was not a note, but a mere memorandum about a certain agency.

It appears from the findings that at the time defendant signed the note the said Jones and one Moss falsely represented to him that it was not a promissory note, or any contract for the payment of money, but was merely a writing by which he signified his willingness to act as agent for the sale of a certain patent hay-fork. Defendant could not read or write the English language, except that he could sign his name. He signed the note without knowing its contents, and believed the said representations of said Jones and Moss. Plaintiff purchased the note for four hundred dollars before its maturity, and had no notice or knowledge that it was procured as aforesaid, or of anything that affected its validity as between the original parties. It is also found that "plaintiff is the indorsee of said note in due course," and that "defendant signed said note voluntarily, and without exercising the ordinary care in regard to the character of the paper signed which a prudent business man would and should exercise."

The defense set up cannot be maintained; and the judgment of the superior court was right. It is found by the court (fully enough, we think) that the defendant, in signing the note, did not exercise ordinary care. Indeed, the act of signing the paper, as shown in the findings (and there is no evidence here), was itself intrinsically careless. Therefore, leaving other aspects of the case out of view, it is clear that the judgment was right upon the principle that when one by his carelessness and undue confidence has enabled another to obtain the money of an innocent third person, he must answer for the loss which he has thus caused.

2. It is not necessary here to pass definitely upon the broader question discussed in the briefs, whether or not payment of a negotiable note in the hands of an innocent indorsee, who received it before maturity, can be avoided, under any circumstances, on the ground that it was procured by fraud. It is

apparent that to apply to such an instrument the principles which establish the essentials of an ordinary contract as between the original parties,—as, for instance, that there must be consent of the parties and a sufficient consideration; that where there was no intention to sign there was, in law, no signature; that fraud vitiates a contract *ab initio*, etc.,—would be to undermine the whole structure of commercial law, and “shake paper credit to its foundation.” The former decisions of this court seem to be in the direction of holding that in such a case payment cannot be avoided for fraud in the original procurement of the note: *Mitchell v. Hackett*, 14 Cal. 666; *Hellmann v. Potter*, 6 Id. 14; *Rich v. Davis*, 4 Id. 22; *Haight v. Joyce*, 2 Id. 65; 56 Am. Dec. 311; *Rich v. Davis*, 6 Cal. 141; *Meyer v. Porter*, 65 Id. 67; *Fuller v. Hutchings*, 10 Id. 523; 70 Am. Dec. 746; *Poorman v. Mills & Co.*, 39 Cal. 345; 2 Am. Rep. 451; *Smith v. Silsby*, 55 Cal. 470. In *Shepherd v. Jones*, 71 Id. 225, it does not appear that the note there involved was negotiable or transferred before maturity; and there is no discussion in the opinion of the general question here under consideration. In Indiana a great many cases arose similar in their facts to those of the case at bar; and it was uniformly held there that the defense set up could not be maintained. The current of American authorities seems to be in the same direction.

Judgment affirmed.

THORNTON, J. I concur in the judgment on the ground that the defense here urged cannot be made against plaintiff, who is an innocent purchaser before maturity of the negotiable note in suit.

NEGOTIABLE INSTRUMENTS. — Promissory notes given for gambling debts are valid in the hands of innocent indorsees: *Haight v. Joyce*, 2 Cal. 64; 56 Am. Dec. 311, and note 313; as to the protection of a *bona fide* holder of negotiable paper before maturity, compare *Poorman v. Mills*, 39 Cal. 345; 2 Am. Rep. 451; *Fuller v. Hutchings*, 10 Cal. 523; 70 Am. Dec. 746, and note. Compare *Corbin v. Wachhorst*, 73 Cal. 411; *Hoyt v. Cross*, 108 N. Y. 76.

FRAUD IN INCEPTION OF NEGOTIABLE INSTRUMENTS AS AFFECTING BONA FIDE HOLDERS. — Who are *bona fide* holders of negotiable paper, and their rights in general, will be found considered in the notes to *Ayer v. Hutchins*, 3 Am. Dec. 235; *Bay v. Coddington*, 9 Id. 272; *Sims v. Lyles*, 26 Id. 156; *Bailey v. Smith*, 84 Id. 401. It is now proposed to discuss particularly the effect of fraud in the inception of negotiable paper upon *bona fide* holders thereof.

BONA FIDE HOLDER TAKES INSTRUMENT UNAFFECTED BY FRAUD IN ITS ORIGIN. — The general rule is well settled that a holder of a negotiable instrument who acquires it *bona fide*, without notice, in the usual course of

business, for a valuable consideration, and before maturity, takes the paper unaffected by fraud in its origin: *Swift v. Tyson*, 16 Pet. 1, 15; *Goodman v. Simonds*, 20 How. 343; *Brown v. Spofford*, 95 U. S. 474; *Cromwell v. County of Sac*, 96 Id. 51; *Slacom v. Wishart*, 3 McLean, 517; *Barney v. Earle*, 13 Ala. 106; *State ex rel. Plock v. Cobb*, 64 Id. 127; *Humphrey v. Clark*, 27 Conn. 381; *Von Windisch v. Klaus*, 46 Id. 433; *Robinson v. Bank of Darin*, 18 Ga. 65; *Gridley v. Banc*, 57 Ill. 529; *Stoner v. Milliken*, 85 Id. 218; *Hereth v. Merchants' Nat. Bank*, 34 Ind. 380; *Woollen v. Vankirk*, 61 Id. 497; *First Nat. Bank v. Lotton*, 67 Id. 256; *Helms v. Wayne Agricultural Co.*, 73 Id. 325; 38 Am. Rep. 147; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 535; *Blair v. Buser*, 1 Wils. (Ind.) 333; *Temple v. Hays*, Morris, 9, 12; *Stein v. Keeler*, 4 G. Greene, 86; *Clapp v. County of Cedar*, 5 Iowa, 15; 68 Am. Dec. 678; *Sully v. Goldsmith*, 32 Iowa, 397; *Wait v. Chandler*, 63 Me. 257; *Farrell v. Lovett*, 68 Id. 326; 23 Am. Rep. 59; *Hobart v. Penny*, 70 Me. 248; *Burrill v. Parsons*, 71 Id. 282; *Crampton v. Perkins*, 65 Md. 22; *Thurston v. McKown*, 6 Mass. 428; *Smith v. Livingston*, 111 Id. 342; *Winstead v. Davis*, 40 Miss. 785, 787; *Corby v. Butler*, 55 Mo. 398; *Perkins v. Chellis*, 1 N. H. 254; *Paige v. Chapman*, 58 Id. 333; *Dougherty v. Scudder*, 17 N. J. Eq. 248; *Holcomb v. Wyckoff*, 35 N. J. L. 35; 10 Am. Rep. 219; *Gould v. Segee*, 5 Duer, 260; *Clothier v. Adriance*, 51 N. Y. 322; *Selser v. Brock*, 3 Ohio St. 302; *Farmers' etc. Bank v. Lucas*, 26 Id. 385; *Kingsland v. Pryor*, 33 Id. 19; *Ridgway v. Farmers' Bank*, 12 Serg. & R. 256; 14 Am. Rep. 681; *Craig v. Sibbett*, 15 Pa. St. 238; *Third Nat. Bank v. McCann*, 15 Phila. 326; *Powers v. Ball*, 27 Vt. 662; *Robinson v. Reynolds*, 2 Q. B. 196. Fraud, therefore, cannot be urged either defensively or affirmatively against a *bona fide* holder. This rule is but an application of the broader doctrine that such a holder is not, in general, subject to infirmities which may exist in the inception of the instrument, and which may be taken advantage of between the original parties. "If any rule of law in regard to negotiable paper is well established," says Redfield, C. J., in *Powers v. Ball*, *supra*, "it is that a *bona fide* holder for value will be able to shut out all defenses, except certain statutory ones, where the paper in its inception is declared absolutely void, as notes or bills given upon gambling and usurious considerations." Dures, even, in executing the paper, will not be a defense in his hands: *Farmers' etc. Bank v. Butler*, 48 Mich. 192.

It is not necessary, in order to entitle a holder to the protection of the rule, that he be a subsequent transferee from or through an original party to the instrument. The payee himself may be protected. Thus if a person is induced to sign a note as surety by the fraudulent representations of the principal maker, he will, notwithstanding, be liable to the payee, if it does not appear that the payee knew of the fraud: *Quinn v. Hard*, 43 Vt. 375; *Farmers' etc. Bank v. Lucas*, 26 Ohio St. 385. Even if the surety was induced to sign under the belief that forged names appearing on the paper were genuine, he will be bound to an innocent payee: *Selser v. Brock*, 3 Id. 302; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325; 38 Am. Rep. 147; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Stoner v. Milliken*, 85 Ill. 218; *Gridley v. Banc*, 57 Id. 529.

If the holder have notice of the fraud in the origin of the paper, or if he takes in bad faith, he, of course, can claim no recovery from the defrauded party: *Fisher v. Leland*, 4 Cush. 456; 50 Am. Dec. 805; *City Bank of Columbus v. Phillips*, 22 Mo. 85; 64 Am. Dec. 254; *Crampton v. Perkins*, 65 Md. 22; *Ormsbee v. Howe*, 54 Vt. 182; 41 Am. Rep. 841; and the same would be true if he paid no value, or if he took after maturity, unless, in any of these cases, he acquired the instrument from one in whose hands it is not subject

to the defense, obtaining thereby the title of such transferor: *Commissioners of Marion County v. Clark*, 94 U. S. 273; *Cromwell v. County of Sac*, 96 Id. 8; *Simon v. Merritt*, 33 Iowa, 537; *Morner v. Cooper*, 35 Id. 257; *Hereth v. Merchants' National Bank*, 34 Ind. 380; *Riley v. Schawacker*, 50 Id. 592; *Boyd v. McClan*, 10 Md. 118; *Merchants' Bank v. President etc. of Farmers' Bank*, cited 10 Id. 123; *Bassett v. Avery*, 15 Ohio St. 299; *Bodley v. Emporia Nat. Bank*, 38 Kan. 59; *Gould v. Segee*, 5 Duer, 230, 268; *Woodman v. Churchill*, 32 Ma. 58; *Masters v. Ibberson*, 8 Com. B. 100. If, also, the action is between the original parties, there can be no question as to the right of the defended party to set up the defense against the one who perpetrated the fraud, as in case of any other contract. And it is held a promissory note may be avoided *in toto* for fraud, in the hands of the payee, where the maker, who was an illiterate man, signed it after it was read over to him as bearing a different and less rate of interest than that expressed upon its face: *Stacy v. Bus*, 27 Tex. 3; 84 Am. Dec. 604. But if a note be given for the purpose of defrauding the maker's creditors, it has been held that it cannot be avoided by the maker for that fact, but may be enforced against him by the payee: *Carpenter v. McClure*, 39 Vt. 9; 91 Am. Dec. 370; and, at all events, such fraud would be no defense to an action brought by an indorsee who took the note for value, before maturity, and without notice of the fraud: *Pater v. Belden*, 105 Mass. 11.

Fraud perpetrated upon some other holder of a negotiable instrument with reference thereto will also be no defense to one sued thereon. Thus it is no defense to an action on a promissory note by an indorsee against the maker that the note was obtained from the payee by means of fraudulent representations of which the indorsee had knowledge when he received the note: *Prent v. Roberts*, 6 Cush. 19; 52 Am. Dec. 761.

In some states, the question of fraud in the procurement or execution of negotiable instruments has been the subject of statutory regulation. Thus in Georgia a section of the code provides that "the *bona fide* holder for value of a bill, draft, or promissory note, or other negotiable instrument, who receives the same before it is due, and without notice of any defect or defense, shall be protected from any defenses set up by the maker, acceptor, or indorser, except . . . fraud in its procurement." The words "fraud in its procurement" have been liberally construed to mean "fraud in the procurement by the holder of the paper"; and therefore a *bona fide* transferee of a promissory note, without notice, and before maturity, will be protected, although the note was procured by the payee from the maker by fraud: *Robinson v. Vason*, 37 Ga. 66; *Hogan v. Moore*, 48 Id. 156, 162; *Merritt v. Bagwell*, 70 Id. 578, 583; and such holder, having a good title, a transferee from him has the same, no matter at what time the transfer to the latter was made: *Hogan v. Moore*, *supra*. This construction, it is said, makes a party responsible for his own fraudulent conduct, but does not make an innocent person responsible for the fraudulent conduct of others of which he had no knowledge.

In Illinois, "if any fraud or circumvention be used in obtaining the making or executing" of any note, it is provided that the note shall be void, not only between the maker and payee, but also in the hands of every subsequent holder. Fraud or circumvention in procuring the execution of a promissory note is, therefore, under this statute, a good defense, whether the transferee took the paper with or without notice thereof: *Hewitt v. Jones*, 72 Ill. 218; *Hubbard v. Rankin*, 71 Id. 129. But the statute does not require both fraud and circumvention, if there be any distinction between the words, in obtain-

ing the making or executing of a note before the defense can be interposed; it is sufficient if either be practiced: *Hewett v. Johnson*, 72 Ill. 513. "A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it when he did not intend to do such an act. Circumvention seems to be nearly, if not quite, synonymous with fraud": *Per Walker, C. J.*, in *Latham v. Smith*, 45 Id. 25, 27. It is a well-settled interpretation of this provision that the fraud or circumvention which will avoid a promissory note in the hands of an innocent holder for value, and before maturity, must be in the "making or executing" the same, and not in the contract or consideration upon which the note was given: *Woods v. Hynes*, 1 Scam. 103; *Mulford v. Shepard*, 1 Id. 583; 33 Am. Dec. 432; *Latham v. Smith*, 45 Ill. 25, 27; *Shipley v. Carroll*, 45 Id. 285; *Depey v. Schwyter*, 45 Id. 306; *Murray v. Beckwith*, 48 Id. 391; *Culver v. Hide and Leather Bank*, 78 Id. 625; *Taylor v. Thompson*, 3 Ill. App. 109; *Hayden v. Olinger*, 5 Id. 632. To illustrate: It is no defense against such a holder that the note was given for the price of goods sold by the payee, who made false representations as to their quantity and quality: *Woods v. Hynes, supra*; or that the note was given for the purchase price of land about which the payee made false representations: *Mulford v. Shepard, supra*; nor is a misrepresentation by the payee in regard to the legal effect of the instrument—as that it would not become operative until the maker should put a revenue-stamp upon it, and the property for which it was given should be delivered—such fraud or circumvention in obtaining the note as will amount to a defense against an innocent transferee for value, before maturity: *Latham v. Smith, supra*; and the same is true of the violation of a promise by vendors to vendees, made as an inducement to the execution of the note for the balance of the price of goods sold, not to assign the same, and to allow the vendees on the note all damages to which they might be entitled by reason of a failure of warranty as to the quality of the goods: *Murray v. Beckwith, supra*; so the failure of consideration, in whole or in part, can plainly not be set up as a defense in the hands of such a holder: *Culver v. Hide and Leather Bank, supra*; *Taylor v. Thompson, supra*; and where certain persons were induced to sign a note as sureties, on the representations of the principal maker that certain others would also sign, but the note was delivered by the latter without such signatures, the payee, who did not participate in the representations, or have any notice of them, is not affected thereby: *Young v. Ward*, 21 Ill. 223; and it is also held that where a person, as a matter of amusement, and without any design of delivering the paper to the payee, signed her name to a promissory note, which was afterwards stolen by the payee, and transferred to one who paid value and without notice, that there was no "fraud or circumvention" in obtaining or executing the note, within the meaning of the statute, which would defeat an action by the holder against the maker: *Shipley v. Carroll*, 45 Ill. 285; but while this ruling may be correct, it would seem that the case should have been decided differently, because of the want of delivery. "It must be borne in mind," says Walker, C. J., in *Latham v. Smith, supra*, "that the fraud or covin must relate to the obtention of the instrument itself, and not to the consideration upon which it is based. It is not fraud which relates to the quality, quantity, value, or character of the consideration that moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character; such as giving a note or other agreement for one sum or thing, when it is for another sum or thing; or as giving a note under the belief that it is a receipt."

If, therefore, a person, through artifice, and without negligence on his part, is induced to execute a note as one payable absolutely, under the belief that it was payable only on a contingency, there is such fraud or circumvention as will bar an action under the statute, by any transferee whatsoever: *Munson v. Nichols*, 62 Ill. 111; or where through some false representations, device, or trick, and without negligence, a person signs a note for a larger sum than he intended: *Richardson v. Schirz*, 59 Id. 313; *Auten v. Gruner*, 90 Id. 300; or where through some fraudulent representations, device, or trick, and in the exercise of reasonable prudence and care, he signs a note, supposing that he is signing an instrument of an entirely different character: *Taylor v. Atchison*, 54 Id. 196; 5 Am. Rep. 118; *Puffer v. Smith*, 57 Ill. 527; *Sims v. Box*, 67 Id. 88; *Hubbard v. Rankin*, 71 Id. 129; *Vanbrunt v. Stingley*, 85 Id. 281; compare *Anderson v. Warne*, 71 Id. 20; 22 Am. Rep. 83. But it is necessary in all such cases, notwithstanding the fraud or circumvention, that the maker should have exercised ordinary care and diligence to acquaint himself with the contents of the paper before executing it, or he will be bound to an innocent holder for value and before maturity: *Leach v. Nichols*, 55 Ill. 273; *Mead v. Munson*, 60 Id. 49; *Swannell v. Watson*, 71 Id. 456; *Homes v. Hale*, 71 Id. 552; *Auten v. Gruner*, 90 Id. 300; *Smith v. Cullen*, 5 Ill. App. 422; and whether he was guilty of negligence or not in the execution of the note is held to be a question for the jury: Id.; *Munson v. Nichols*, *supra*.

INSTRUMENTS NEVER DELIVERED, BUT OBTAINED BY FRAUD OR CRIME.—

There is no doubt that delivery of a negotiable instrument is necessary to create any liability as between the immediate parties. And, therefore, if the payee of a promissory note obtains possession thereof by fraud, he cannot maintain any action thereon: *Carter v. McClintock*, 29 Mo. 464. *A fortiori* would this be true if he obtained possession by stealth. But the authorities are conflicting as to whether a *bona fide* holder can recover on an instrument which has never been delivered by the maker or drawer to any one for any purpose. It has been broadly asserted that the fact there was no delivery of a promissory note to any person by or on behalf of the maker was no defense to an action on the note by a *bona fide* holder for value, who received it before maturity: *Kinyon v. Wohlford*, 17 Minn. 239; 10 Am. Rep. 165. In two Illinois cases the same result was reached, under some novel conditions of fact. In one of them, a person, after signing a note, was about to insert a condition in it, when the payee snatched it from him and ran away, and transferred it to an innocent purchaser before maturity: *Clarke v. Johnson*, 54 Ill. 296. In the other, a person, as a mere matter of amusement, and without any intention of delivering the paper to the payee, signed her name to a promissory note, which was afterwards stolen by the payee, and transferred to an innocent purchaser: *Shipley v. Carroll*, 45 Id. 285. These are extreme cases, and of doubtful correctness. It is difficult to see upon what reason they can be sustained, unless upon the ground of the maker's negligence; but then the negligence was not a proximate cause of the notes getting into circulation.

On the other hand, it is maintained that delivery of a negotiable instrument, at least for some purpose, is essential to its validity, even in the hands of a *bona fide* holder for value, and before maturity. At all events, it would seem to be a sound conclusion that where paper requiring no indorsement is stolen from the maker or drawer by a stranger, it never having been voluntarily delivered to any one, there can be no recovery on it, even by an innocent purchaser, before maturity: *Hall v. Wilson*, 16 Barb. 548, 555, *Beardale v. Bennett*, L. R. 3 Q. B. D. 525; certainly this should be so if th

instrument is incomplete: *Ledwich v. McKim*, 53 N. Y. 307. But cases have gone further. Thus in *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497, the maker signed a promissory note, payable to the order of another, but did not deliver it, and while he was temporarily absent from the room, the payee, contrary to the maker's prohibition, took the note from the table where it had been left by the maker, and went away with it. It was held that the maker was not liable thereon, even to a *bona fide* indorsee for value, and before maturity. Again, in *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357, a person was induced by fraud to sign his name to a promissory note, when he supposed that he was writing his name on a blank piece of paper, to enable the payees to see how his name was spelled or written. The maker did not, after he discovered that he had so signed his name to a note, voluntarily deliver it to the payees; but it was wrongfully and forcibly taken possession of by them, and by them carried away against the maker's consent. It was held that these facts constituted a good defense to the note in the hands of an indorsee in good faith for value, and before maturity. In these cases, the notes were decided to be invalid for want of delivery; and furthermore, there was no negligence or estoppel on which the makers could be charged. But it is held that one who attempts to cancel negotiable paper which he has signed, but not put in circulation, may do it so ineffectually and negligently that if it be thereafter obtained and fraudulently transferred, he may be liable to a *bona fide* purchaser for value: *Ingram v. Primrose*, 7 Com. B., N. S., 82; compare *Schloey v. Ramsbottom*, 2 Camp. 485.

INSTRUMENTS PUT IN CIRCULATION IN VIOLATION OF INSTRUCTIONS OR CONDITIONS. — The case where a negotiable instrument is put in circulation in violation of instructions or conditions on which it is intrusted by the party signing to another, evidently differs from the case last considered, where the paper has never voluntarily been intrusted to any one, but the possession is at the outset wrongfully obtained. If the paper comes into the hands of a *bona fide* holder for value, and without notice, there is, in the former case, room for the operation of the principle, of two innocent persons, that one should suffer who placed it in the power of another to commit the wrong; and the right of such a holder to recover has been rarely denied. A recovery by the *bona fide* holder in this case is, we take it, more properly due to this principle than to any special doctrine appertaining to negotiable instruments. If, then, bonds of a corporation are wrongfully put in circulation by its agents or officers, an accommodation indorser, as well as the corporation itself, will be liable to an innocent holder for value: *Gilman v. New Orleans etc. R. R.*, 72 Ala. 566; *Grand Rapids etc. R. R. v. Sanders*, 17 Hun, 552. So a person will be liable to a *bona fide* holder for value on negotiable paper which he intrusts to an agent for negotiation, and which the agent misappropriates: *Goodman v. Simonds*, 20 How. 343; *Brush v. Scribner*, 11 Conn. 388; 29 Am. Dec. 303; *Fisher v. Fisher*, 98 Mass. 303; and a person is likewise liable where he indorses a note for accommodation, and intrusts it to his clerk to deliver it to a certain person, on the latter's signing it with the name of a firm as makers, and the clerk delivers the note before it is signed by any one: *Whitmore v. Nickerson*, 125 Id. 496; 28 Am. Rep. 257; or where one signs a note as surety, and delivers it to his agent with instructions to make inquiries of a certain person as to the solvency of the principal maker, and not to deliver it to the payee unless such person should be of the opinion that the principal maker was solvent, but the agent causes the note to be delivered to the payee without making the inquiries: *Taylor v. Craig*, 2 J. J. Marsh. 449.

The same result follows where an accommodation party intrusts the paper to the accommodated party for a specific purpose, and the latter wrongfully uses it for a different purpose: *President etc. of Chicopee Bank v. Chapin*, 8 Met. 40; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 568; *Woodruff v. Hill*, 116 Mass. 310; *Hemphill v. Bank of Alabama*, 6 Smedes & M. 44; *Fanning v. Farmers' Bank*, 8 Id. 139. An innocent holder for value is likewise unaffected by the fact that the instrument was transferred by the payee in violation of a condition on which it was held by him: *Bush v. Peckard*, 3 Harr. (Del.) 385; and see *Kota v. Watkins*, 26 Kan. 691; 40 Am. Rep. 336; or that the paper payable to one's own order was not to be used, but should operate as a receipt merely: *Redlich v. Dall*, 54 N. Y. 234; or that the party from whom he received the paper had possession of it for certain purposes, and misappropriated it: *Collins v. Gilbert*, 94 U. S. 753; or that the paper was negotiated in violation of a condition on which it was signed or indorsed by an accommodation party: *Gage v. Sharp*, 24 Iowa, 15; *Davis v. Lee*, 26 Miss. 505; *Small v. Smith*, 1 Denio, 583; and see *Watson v. Russell*, 3 Best & S. 34; affirmed in 5 Id. 968; *Clark v. Thayer*, 105 Mass. 216; and, consequently, one who signs or indorses a note as surety cannot defend an action thereon, either by the innocent payee or any other *bona fide* holder for value, on the ground that the principal maker, to whom he intrusted the note, delivered the same in violation of a condition that a certain other person or persons should also first sign or indorse as co-sureties: *Bonner v. Nelson*, 57 Ga. 433; *Clark v. Bryce*, 64 Id. 486; *Young v. Ward*, 21 Id. 223; *Deardorff v. Foresman*, 24 Ind. 481; *Smith v. Moberly*, 10 B. Mon. 286; 52 Am. Dec. 543; *Bank of Missouri v. Phillips*, 17 Mo. 29; *Massman v. Holcher*, 49 Id. 87; *Merriam v. Rockwood*, 47 N. H. 81; *Passumpsic Bank v. Goss*, 31 Vt. 315; *Dixon v. Dixon*, 31 Id. 450; *Farmers' etc. Bank v. Humphrey*, 36 Id. 554; but this rule was denied in *Atode v. Dixon*, 6 Ex. 869, and in *Perry v. Patterson*, 5 Humph. 133, 136; and a majority of the supreme court of Missouri refused to apply it to a non-negotiable note in *Ayres v. Milroy*, 53 Mo. 516; but the first two of these latter cases are opposed to the weight of authority; and the last case does not give a proper effect to the principle above noted, on which this question rests.

Finally, if a promissory note be deposited with a third person as an escrow, and it is delivered to the payee without the maker's knowledge and consent, and without the happening of the condition on which it was to be delivered, the maker is, nevertheless, liable to an innocent holder for value: *Vallett v. Parker*, 6 Wend. 615; *Fearing v. Clark*, 16 Gray, 74; 77 Am. Dec. 394; *Graf v. Logue*, 61 Iowa, 704; Bigelow, C. J., saying, in *Fearing v. Clark*, *supra*: "It is undoubtedly true that, as between the original parties to a note, or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case, a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note." But it has been otherwise held that where a promissory note and mortgage securing it were placed in the hands of a mere custodian, indifferent between the parties, to be delivered to the payee upon the happening of a certain event, and the custodian, without authority, delivered the papers to the payee without waiting for such event, the maker was not liable thereon, for want of a proper delivery, even to a *bona fide* holder for value: *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1; and also where negotiable instruments, running to a railroad company, were deposite-

ited by the makers with a third person, to be held by him subject to their order only, and an agent of the company fraudulently induced a clerk of the custodian to let him take the instruments for the purpose of making a schedule of them, promising to return them as soon as that was done, but such agent delivered them to the company, which negotiated them for value, before maturity, to persons who had no notice of the facts, it was held that there could be no recovery thereon against the makers, because there had been no valid delivery: *Roberts v. McGrath*, 38 Wis. 52; *Roberts v. Wood*, 38 Id. 60; and see *Andrews v. Thayer*, 30 Id. 228. These Wisconsin cases are, however, opposed both to principle and the weight of authority.

INSTRUMENTS EXECUTED IN BLANK AND WRONGFULLY FILLED UP. — Intimately connected with the last head is the case where one executes or signs negotiable paper in blank, and intrusts the same to another, with specific directions or on an express understanding as to the filling up of the blanks. It is well settled that such person is liable to a *bona fide* holder for value, whether the paper be for accommodation, or be intended to be used for his own benefit, if the blanks are wrongfully filled up, by the one to whom the paper is intrusted, for larger amounts, or on different terms, or they are filled up by the *bona fide* holder to whom the paper is transferred in blank by such person without notice of the limiting instructions or agreement, and the signer has been thereby defrauded. Negotiable instruments so executed carry on their face an implied authority to fill up the blanks, and perfect the paper in conformity with the apparent object of the blanks. And the signer cannot complain, as against the *bona fide* holder, that the person to whom he intrusted the paper violated the confidence reposed in him. Of the two innocent parties, the maker and the innocent holder, the former should bear the loss, because he placed it in the power of the third person to perpetrate the wrong: *Russel v. Langstaffe*, 2 Doug. 514; *Collis v. Emmet*, 1 H. Black. 312; *Schultz v. Astley*, 2 Bing. N. C. 544; *Montague v. Perkins*, 22 Eng. L. & Eq. 516; *London etc. Bank v. Wentworth*, L. R. 5 Ex. Div. 96, 101; *Bank of Pittsburgh v. Neal*, 22 How. Pr. 96, 107; *Putnam v. Sullivan*, 4 Mass. 45; 3 Am. Dec. 206; *President etc. of Androscoggin Bank v. Kimball*, 10 Cush. 373; *Roberts v. Adams*, 8 Port. 297; 33 Am. Dec. 291; *Herbert v. Huie*, 1 Ala. 18; 34 Am. Dec. 755; *Huntington v. Branch Bank at Mobile*, 3 Ala. 186; *Marshall v. Drescher*, 68 Ind. 359; *Eichelberger v. Old Nat. Bank*, 103 Id. 401; *McDonald v. Muscatine Nat. Bank*, 27 Iowa, 319; *Joseph v. First Nat. Bank*, 17 Kan. 256; *Bank of Commonwealth v. Curry*, 2 Dana, 142; *Hemphill v. Bank of Alabama*, 6 Smedes & M. 44; *Fanning v. Farmers' etc. Bank*, 8 Id. 139; *Torrey v. Fisk*, 10 Id. 590; *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Dall*, 54 Id. 234; *Fullerton v. Sturgis*, 4 Ohio St. 529; *Schryver v. Hawkes*, 22 Id. 306; *Diercks v. Roberts*, 13 S. C. 338; *Nichol v. Bate*, 10 Yerg. 429; *Orrick v. Colston*, 7 Gratt. 189. "The indorsement on a blank note," says Lord Mansfield, in *Russel v. Langstaffe*, *supra*, "is a letter of credit for an indefinite sum."

As between the immediate parties to the transaction, the paper, of course, can only be filled up in conformity with the authority conferred, although if there are no restrictions the authority is general: *Davidson v. Lanier*, 4 Wall. 447, 456. And in no case is any implied authority conferred to fill up a blank with matter foreign to the apparent purpose for which it had been left: *McCoy v. Lockwood*, 71 Ind. 319; "the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to

what was plainly and clearly expressed in the instrument before delivery": *Angle v. Northwestern L. Ins. Co.*, 92 U. S. 330; nor, of course, has the person intrusted with the instrument authority to alter a material stipulation not left blank: *Coburn v. Webb*, 56 Ind. 96. If the paper be taken with notice that the blanks have been filled up without authority, or in fraud, the defense can be maintained on that ground: *Davidson v. Lanier*, *supra*; *Gow v. Whitehead*, 33 Miss. 213; but in Mississippi it is held that a note will not be avoided *in toto*, but only as to the excess, where a person takes the paper with notice that an agent to whom it was intrusted in blank has exceeded his authority as to the amount to be inserted: *Johnson v. Blandale*, 1 Smedes & M. 17; 40 Am. Dec. 85; *Goad v. Hart's Adm'rs*, 8 Smedes & M. 787.

It is an entirely different case, however, where one writes his name on a blank piece of paper, of which another takes possession without authority, and writes a promissory note above the signature. The signer cannot be held by a *bona fide* transferee: *Nance v. Lary*, 5 Ala. 370. No confidence is reposed by the signer in any one, for the violation of which he might be held, but the making of the note is a forgery. No instrument whatever was intended to be made by the signer which should be binding upon him. So where a person wrote his name on a blank piece of paper, for the purpose of identifying his signature, and the one to whom it was given, without the knowledge of the signer, wrote over the signature a promissory note, the instrument is a forgery, and an innocent holder for value is not entitled to recover: *Caulkins v. Whisler*, 29 Iowa, 405; 4 Am. Rep. 236.

INSTRUMENT SO EXECUTED THAT A PORTION THEREOF MAY BE DETACHED OR ALTERED. — If a person signs a note to which a condition is so attached that it is perfectly apparent to him that the condition may be separated from the note, and the note left a perfect negotiable instrument without anything on its face to indicate that the condition had ever constituted a part of it, the maker will be guilty of such negligence that the wrongful separation of the condition will be no defense to an action against him on the note by a *bona fide* holder for value, and before maturity: *Cornell v. Nebeker*, 58 Ind. 425; *Zimmerman v. Rote*, 75 Pa. St. 188; compare *Cochran v. Nebeker*, 48 Ind. 459. "It is the duty of the maker of the note," says the court in *Zimmerman v. Rote*, *supra*, "to guard, not only himself, but the public, against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them with ease, and without ready detection." If, however, there is no question of negligence on the part of the maker, the unauthorized separation of the condition would be such a material alteration as would avoid the note, even in the hands of the innocent purchaser: *Benedict v. Cowden*, 49 N. Y. 396; 10 Am. Rep. 382; *Wait v. Pomeroy*, 20 Mich. 425; 4 Am. Rep. 395. The case of *Stephens v. Davis*, 85 Tenn. 271, however, holds that where a promissory note, taken from a book of printed blank notes, was signed after a condition was written on the stub, and the stub was detached by the payee or his agent, the detachment of the stub avoided the note, even in the hands of an innocent holder, before maturity, and that an instruction that if the stub could be easily removed without defacing the note, the maker would not be entitled to relief on account of his own negligence, was erroneous. The decision is opposed to the cases first cited, and seems to be based upon a misapprehension of *Benedict v. Cowden* and *Wait v. Pomeroy*, *supra*, where the element of negligence was not really involved, although in *Wait v. Pomeroy* some of the observations of Chief Justice Campbell tend towards maintaining

the view that the maker would in no event be liable if the condition were detached. In *Palmer v. Largent*, 5 Neb. 223, it is held that while the fraudulent removal of a memorandum, written under a promissory note, and qualifying it, vitiates the instrument, even in the hands of a *bona fide* holder, yet where the words alleged to have been removed by the payee were "this note is given upon condition," and there is nothing to show what the condition was, the removal does not vitiate the instrument, inasmuch as the words were entirely immaterial.

For the same reason, if one signs an instrument which is apparent to him to be in such a form that a note included in it may be so detached from the rest of the instrument as to appear a simple promissory note, he will be liable thereon, if it is so detached, to a *bona fide* holder for value, and before maturity: *Woollen v. Utrich*, 64 Ind. 120; *Woollen v. Whitacre*, 73 Id. 198; but here, again, the maker is held not liable in the absence of negligence, and that the question of negligence is for the jury: *Brown v. Reed*, 79 Pa. St. 370; 21 Am. Rep. 75; *Sharswood, J.*, remarking: "If the maker of a bill, note, or check issues it in such a condition that it may be easily altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity." Likewise, where a person signed a printed note, in the blank of which was written "one hundred," leaving a space between these words and the printed word "dollars," which space was filled by the payee after delivery with the word "fifty," written in the same hand, and there being nothing suspicious in the appearance of the paper, it was held that the maker was liable for the face of the note to a *bona fide* holder for value, and before maturity: *Garrard v. Haddan*, 67 Pa. St. 82; 5 Am. Rep. 412.

INSTRUMENTS MISTAKENLY EXECUTED UNDER FALSE REPRESENTATIONS.

— There is no doubt that if one signs a negotiable instrument without reading it, or if he cannot read, without asking to have it read to him, he cannot avoid the legal effect of his signature, even against an original party, by setting up his ignorance of the contents of the paper, in the absence of fraud, deceit, or misrepresentation: *Goetter v. Pickett*, 61 Ala. 387; *Dawson v. Burrus*, 73 Id. 111; *Burroughs v. Pacific Guano Co.*, 81 Id. 255; *Pacific Guano Co. v. Anglin*, 82 Id. 492; *Cannon v. Lindsey*, 85 Id. 198; 7 Am. St. Rep. 38; *Rogers v. Place*, 29 Ind. 577. In the frequently quoted language of Gibson, C. J., in *Greenfield's Estate*, 14 Pa. St. 489: "If a party, who can read, will not read a deed put before him for execution, or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law." Proof that the grantor of a deed was very ignorant and illiterate, and could not read writing, and that the deed was not read to him, is not sufficient to avoid the deed, unless he requested it to be read: *Hallenbeck v. Dewitt*, 2 Johns. 404.

It is quite a different matter, however, if one signs negotiable paper relying upon the false representations of another as to its contents. There are two classes of cases. He may intend to sign a negotiable instrument, but misrepresentations may be made as to its terms; or he may, through some fraudulent representation, device, or trick, have signed such an instrument supposing that it is an instrument of an entirely different character. As a general proposition, applicable to the first class, it may be stated that one who executes a promissory note, intending to sign it for a certain sum, or according to certain terms, cannot, in an action against him by an innocent holder for value before maturity, set up as a defense that, through the fraudulent repre-

ulations of the payee or his agent, or through the false reading of the paper to him by the latter, it was executed for a larger sum, or with different terms than he intended, if he was guilty of negligence in failing to use reasonable care to inform himself of the contents of the instrument: *Craig v. Hobbs*, 44 Ind. 363; *Dutton v. Clapper*, 53 Id. 276; *Yeagley v. Webb*, 86 Id. 424; *Wright v. Plam*, 33 Iowa, 159; *Fayette County Savings Bank v. Steffes*, 54 Ill. 214; *Griffiths v. Kellogg*, 39 Wis. 290; 20 Am. Rep. 48; *Roach v. Karr*, 18 Kas. 529; 26 Am. Rep. 788; and as heretofore shown, this rule is also true under the statutes of Georgia and Illinois: *Merritt v. Bagwell*, 70 Ga. 578, 583; *Leach v. Nichols*, 55 Ill. 273; *Richardson v. Schirtz*, 59 Id. 313; *Mead v. Munson*, 60 Id. 49; *Munson v. Nichols*, 62 Id. 111; *Homes v. Hale*, 71 Id. 552; *Aulz v. Gruner*, 90 Id. 300. There is, however, some confusion among these cases in regard to the question how the negligence is to be determined. There seems to have been a tendency to submit the matter to the jury, and there is no doubt that, ordinarily, and when the facts are disputed, or there is room for a fair difference of opinion on the facts as shown, the question is one for the jury; but it would seem, at all events, that when it clearly appears that the maker signed the instrument without reading it, or if he could not read, without having it read over to him, relying instead upon the false representations of the payee or his agent, he is guilty of such negligence, as a matter of law, as will prevent the fraud from being an available defense as against an innocent holder for value, and before maturity. Under other special circumstances, the question might also be one of law.

More difficulty is encountered with the class of cases where the negotiable instrument was executed by the party through a false representation, device, or trick, under the belief that he was signing an instrument of a totally different character. The general rule has been well stated as follows: "The party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and who has no intention of signing it, and who is guilty of no negligence in affixing his signature or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included": *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548; *Kellogg v. Steiner*, 29 Wis. 626; *Butler v. Carns*, 37 Id. 61; *Chase v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Webb v. Corbin*, 78 Ind. 403. It is thus observed that the negligence of the signer is the important factor in determining whether or not he may be held liable to an innocent holder for value before maturity. But it has been held by some cases that the one who executes the paper under such circumstances will be liable, irrespective of the question of negligence: *Rowland v. Fowler*, 47 Conn. 347; *First Nat. Bank v. Johns*, 22 W. Va. 520; 46 Am. Rep. 506; and, on the other hand, there are *dicta* and decisions to the effect that he incurs no liability at all, notwithstanding he may have been negligent: *Briggs v. Ewart*, 51 Mo. 245; 11 Am. Rep. 445; *Martin v. Smylee*, 55 Mo. 577; *Corby v. Weddle*, 57 Id. 452; *Gilbe v. Linabury*, 22 Mich. 479; 7 Am. Rep. 675; *Anderson v. Walter*, 34 Mich. 113, 119. These latter views, however, do not accord with either principle or authority. See the earlier Missouri cases, modified by *Shirts v. Overjohn*, 60 Mo. 305. The amount of care which the signer is required to exercise is generally expressed as "ordinary"; but in *Dinsmore v. Stimbert*, 12 Neb. 433, in an action on a promissory note by *bona fide* transferee for value before maturity, it was held that an instruction that the verdict should be for the defendant, if he, "before signing said note, used the diligence and care that a man of ordinary care and prudence would have used, under similar circumstances, to ascertain its contents, and was without

fact," was erroneous; and that the jury should have been told that to make such defense available, the defendant must not have been guilty of any negligence in signing the paper.

Generally speaking, the question of the signer's negligence is a fact to be submitted to the jury: See *Poster v. Mackinson*, 1 R. 4 Com. P. 704; *Webb v. Corbin*, 73 Ind. 403; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401; *Fenton v. Robinson*, 4 Hun, 252; *Ross v. Doland*, 29 Ohio St. 473; *De Camp v. Hamma*, 29 Id. 467; *Citizen's Nat. Bank v. Smith*, 55 N. H. 593; *Sims v. Bice*, 67 Ill. 88; but where it is shown that he, being able to read, signed the instrument without reading it, or not being able to read, he signed it without having it read over to him, relying upon the false representations of the payee or his agent, especially if the latter be a stranger, that it was an instrument of a different character, or upon the false reading of it by such person, if he can himself read, he should be held to be negligent as a matter of law, and a recovery can consequently be had against him by a bona fide holder for value before maturity: See *Nebecker v. Cutsinger*, 48 Ind. 436; *Morn v. Vancuren*, 49 Id. 201; *Gless v. Porter*, 49 Id. 500; *Kimble v. Christie*, 55 Id. 140; *Woollen v. Ulrick*, 64 Id. 120; *Maxwell v. Morehart*, 66 Id. 301; *Thomas v. Ruddell*, 66 Id. 326; *Indiana Nat. Bank v. Weckerly*, 67 Id. 345; *Fisher v. Von Behren*, 70 Id. 19; 36 Am. Rep. 162; *Ruddell v. Phalar*, 72 Ind. 533; 37 Am. Rep. 177; *Ruddell v. Dillman*, 73 Ind. 518; 38 Am. Rep. 152; *American Ins. Co. v. McWhorter*, 78 Ind. 136; *Williams v. Stoll*, 79 Id. 80; 41 Am. Rep. 604; *Baldwin v. Burrows*, 86 Ind. 351; *Douglas v. Matting*, 29 Iowa, 498; 4 Am. Rep. 238; *Loomis v. Metcalf*, 30 Iowa, 382; *McCormack v. Molburg*, 43 Id. 561; *Ort v. Fowler*, 31 Kan. 478; 47 Am. Rep. 501; *Kellogg v. Curtis*, 65 Me. 59; *Shirts v. Overjohn*, 60 Mo. 305; *De Camp v. Hamma*, 29 Ohio St. 467, 471; *Phelan v. Moss*, 67 Pa. St. 59; 5 Am. Rep. 402. On the other hand, where a party's signature to a promissory note was obtained by fraud as to the character of the paper itself, he being sick, and enfeebled in mind and body, and unable to read the paper, and there being no one to whom he could appeal for assistance, and the paper having been misread to him, it was held on demurrer to the answer setting forth these facts that he was guilty of no negligence, and was not liable to an indorsee before due, although it appeared that the persons who obtained the note were strangers to him: *Webb v. Corbin*, *supra*; and in an action by an indorsee against the maker of a note, an answer showing by proper averments that the note was without consideration, and the execution was obtained by fraud while the maker was so under the influence of medicines administered by the person who received the note that he was incapable of comprehending the nature of the transaction, is good on demurrer: *Mitchell v. Tomlinson*, 91 Ind. 167; so an answer to a complaint on a promissory note, brought by an indorsee before maturity against the maker, to the effect that the defendant had entered into a contract of agency with the payee, but that no note was shown or read to the defendant, or intended to be executed by him, but that if it was contained in the paper which he had signed it was so disguised and concealed that he could not with reasonable diligence have discovered the same, is also good on demurrer: *Detweiler v. Bish*, 44 Id. 70.

Whether an illiterate person is guilty of negligence in signing an instrument, which, through fraud, turns out to be negotiable paper, without first having had it read over to him by some one other than the payee or his agent, as by a member of his family, or a friend or neighbor, is also, in general, a question of fact for the jury: *Baldwin v. Bricker*, 56 Ind. 221, 222; *Hopkins*

v. Bankers Ins. Co., 57 Iowa, 203; *Swannell v. Watson*, 71 Ill. 456; *Frederick v. Clemens*, 60 Mo. 313. In *Baldwin v. Barrows*, 86 Ind. 351, it appeared, in an action against the maker of a promissory note, by *bona fide* holders for value, and before maturity, that the maker, who could not read, signed the note upon a representation that it was a mere order for medicines, and without asking his wife, who was present and could read. It was held, on a review of the evidence, that he was liable. In a number of cases it has been held that where a person who could not read, or who could read only with difficulty, signed a note, relying upon the false reading or representations of it by the payee as an instrument of a different character, a verdict in his favor was sustained by the evidence: *Taylor v. Atchison*, 54 Ill. 196; 5 Am. Rep. 118; *Puffer v. Smith*, 57 Ill. 527; *Hubbard v. Rankin*, 71 Id. 129; *Vanbrunt v. Sangley*, 85 Id. 231; *Soper v. Peck*, 51 Mich. 563; *First National Bank v. Deal*, 55 Id. 592. See also *Whitney v. Snyder*, 2 La. 477; *First National Bank v. Lierman*, 5 Neb. 247. But in *Mackey v. Peterson*, 29 Minn. 296, the extreme view was taken that where a person signed a promissory note, supposing it to be a mere receipt, and relying upon the false representations of the payee's agent, who was a stranger, that it was a receipt, and upon the false reading of the paper by the latter to him, he being unable to read English himself, and there being no one who could read English within half a mile, that he was guilty of negligence, and the facts furnished no defense as against a *bona fide* holder for value, and before maturity; while, on the other hand, the case of *Corby v. Weddle*, 57 Mo. 452, holds that where a person signed a promissory note without reading it, he reading writing with difficulty, believing it to be an instrument of a different character, and relying upon the representations of the payee, who was a stranger, that it was an instrument of a different character, a declaration, in an action by an innocent holder for value, and before maturity, to the effect that if the defendant's signature was procured under false pretenses that he was signing an instrument of a different character, he having no intention of making a note, there could be no recovery, thus excluding the question of his negligence, was correct; but more recently it has been decided, under similar circumstances, that the question of negligence should be left to the jury: *Frederick v. Clemens*, 60 Mo. 313; and see also *Shirts v. Overjohn*, 60 Id. 305.

AMOUNT OF RECOVERY BY BONA FIDE HOLDER AGAINST DEFRAUDED MAKER OR INDORSER. — There is no doubt that if a negotiable instrument is valid and binding between the original parties, the payee may sell it at any rate of discount he chooses, and the purchaser will have a right to recover the full face value of the paper: See *Durant v. Banta*, 27 N. J. L. 624, and cases cited; *National Bank v. Green*, 33 Iowa, 140. But if there was fraud in the inception of the paper, the authorities are not agreed as to the amount of recovery by a *bona fide* holder. If the paper was transferred as collateral security merely by one in whose hands the defense of fraud is available, it is clear that the *bona fide* transferee should recover thereon to the extent only of the amount secured, for the reason that as to any surplus over and above that sum he would be a trustee for his transferrer, who is entitled to nothing from the defrauded party: See *President etc. of Chicopee Bank v. Chapin*, 8 Met. 40; *Stoddard v. Kimball*, 6 Cush. 469; *Fisher v. Fisher*, 93 Mass. 303; *Allaire v. Hartshorne*, 21 N. J. L. 665; 47 Am. Dec. 175; *Union National Bank v. Roberts*, 45 Wis. 373; and the same result follows where accommodation paper is transferred as collateral security by the accommodated party, although no question of fraud is involved: *Williams v. Smith*, 2 Hill, 261; *Duncan v. Gilbert*, 29 N. J. L. 521; *Atlas Bank v. Doyle*, 9 B. I. 76; 96 Am. St. Rep., Vol. XI. — 21

Am. Dec. 368; *Valette v. Mason*, 1 Ind. 89. If, however, a negotiable instrument is purchased before maturity by one who has no notice of fraud in its origin, he should be entitled to recover the full amount of the paper against the defrauded party, notwithstanding he may have paid less than its face value: *Cromwell v. County of Sac*, 96 U. S. 51; *Railroad Companies v. Schutte*, 103 Id. 118, 144; *Sully v. Goldsmith*, 32 Iowa, 397; *Lay v. Wiseman*, 36 Id. 305; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; *Hobart v. Penny*, 70 Me. 248, 249; *Bange v. Flint*, 25 Wis. 544, 550; *Tod v. Wick*, 36 Ohio St. 370, 391; *Butterfield v. Town of Ontario*, 32 Fed. Rep. 891. There is evidently a distinction between the case where the transferee takes the paper as collateral security, and where he makes an out and out purchase of it. In the one case he is to account for a surplus, after satisfying the secured claim, to one against whom the defense of fraud may be maintained; in the other, he holds entirely for his own benefit. Presumably, the paper was sold for what it would bring in the market, and to allow a reduction in recovery from its full amount would be depriving the purchaser substantially of his rights as a *bona fide* holder, and permitting, after all, the defense of fraud to be successfully pleaded against him. These considerations apply with particular force to the securities of public and private corporations, which are constantly fluctuating in price; but there is no reason why the rule should not have a general application. A line of cases, notwithstanding, limits the amount of recovery to the price paid: *Stalker v. McDonald*, 6 Hill, 93, 96; 40 Am. Dec. 389; *Moore v. Ryder*, 65 N. Y. 438; *Youngs v. Lee*, 18 Barb. 187, 192; affirmed in 12 N. Y. 551; *Huff v. Wagner*, 63 Barb. 215; *Harger v. Wilson*, 63 Id. 237; *Stevens v. Corn Exchange Bank*, 3 Hun, 147; *Todd v. Shelbourne*, 8 Id. 510; *Holcomb v. Wyckoff*, 35 N. J. L. 35; 10 Am. Rep. 219; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; and see *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 568; compare *Park Bank v. Watson*, 42 N. Y. 490; 1 Am. Rep. 573; *Cardwell v. Hicks*, 37 Barb. 458; *Grand Rapids etc. R. R. v. Sanders*, 17 Hun, 552. Of course, if the transferee should receive notice of the fraud before making full payment, he should be protected only to the amount advanced previous to that time: *Dresser v. Missouri etc. Ry.*, 93 U. S. 92; and see *Hubbard v. Chapin*, 2 Allen, 328; *Crandall v. Vickery*, 45 Barb. 156.

It might also be here noticed that there is no reason, on principle, why a purchaser of accommodation paper from an original party, at a discount, should not, independently perhaps of the usury laws, recover the full face value from the accommodating party. This would certainly seem to be true if he took without notice of the nature of the paper, and it is difficult to see why it should not be true even if he took with notice, provided he acts in good faith: See *Gaul v. Willis*, 26 Pa. St. 259; *Moore v. Baird*, 30 Id. 138; *Daniels v. Wilson*, 21 Minn. 530, 532; but some cases restrict the recovery to the amount paid: *Brown v. Mott*, 7 Johns. 361; *Holeman v. Hobson*, 8 Humph. 127; *Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbard*, 2 Stark. 304; *Simpson v. Clarke*, 2 Crompt. M. & R. 342; as also where the consideration for the paper has failed: *Petty v. Hannum*, 2 Humph. 102. Finally, it might be observed that the fact that less than the face value of the paper was paid by the purchaser might be an important element in determining the *bona fides* of the holder: See note to *Bailey v. Smith*, 84 Am. Dec. 403.

RIGHTS OF TRANSFEREE FROM BONA FIDE HOLDER. — The rule is well settled that one who acquires negotiable paper from a *bona fide* holder for value, and before maturity, acquires the title and rights of such holder. Therefore he will not be affected by the fact that he had notice of fraud in

the origin of the paper: *Cromwell v. County of Sac*, 96 U. S. 51; *Commissioners of Marion County v. Clark*, 94 Id. 278; *Simon v. Merriitt*, 33 Iowa, 537; *Mornger v. Cooper*, 35 Id. 257; *Hereth v. Merchants' Nat. Bank*, 34 Ind. 390; *Riley v. Schawacker*, 50 Id. 592; *Boyd v. McCann*, 10 Md. 118; *Merchants' Bank v. President etc. of Farmers' Bank*, cited 10 Id. 123; *Bassett v. Avery*, 15 Ohio St. 299; *Bodley v. Emporia Nat. Bank*, 38 Kan. 59; *Butterfield v. Town of Ontario*, 32 Fed. Rep. 891; or that he took the paper after maturity: *Gould v. Segee*, 5 Duer, 260, 268; *Woodman v. Churchill*, 52 Ma. 58; *Hogan v. Moore*, 48 Ga. 156, 162; or that he paid no consideration: *Masters v. Ibberson*, 8 Com. B. 100. The same rules exist where the paper was given on an illegal consideration: *Chalmers v. Lanyon*, 1 Camp. 383; *Cotton v. Sterling*, 20 La. Ann. 282; or where it was given without consideration: *Smith v. Hancock*, 14 Me. 449; *Hascall v. Whitmore*, 19 Id. 102; *Peabody v. Rees*, 18 Iowa, 571; *Hoswell v. Crane*, 12 La. Ann. 126; *Watson v. Flanagan*, 14 Tex. 354; *Bank of Sonoma v. Gove*, 63 Cal. 355. "The rule has been too long settled to be questioned now," says Field, J., in *Cromwell v. County of Sac*, *supra*, "that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition." Again, it is well said in *Bassett v. Avery*, *supra*, that "if a party holds a negotiable instrument discharged of defenses which may have existed between the antecedent parties, no reason is perceived why his right of sale should be any more restricted than his right to collect. The liability of the maker is then fixed. It is not increased by a subsequent sale or gift of the note to another; and it would be inconsistent that the law should recognize a perfect title in a party and yet limit his power of disposition in the manner claimed."

BURDEN OF PROOF AS TO BONA FIDE OWNERSHIP. — It is a well-established proposition that the mere possession of a negotiable instrument by the indorsee, or by the transferee where no indorsement is necessary, imports *prima facie* that he is the lawful owner, and that he acquired it before maturity, *bona fide*, for value, in the usual course of business, and without notice of any circumstance impeaching its validity: *Note to Bailey v. Smith*, 84 Am. Dec. 403; *Murray v. Lardner*, 2 Wall. 110; *Carpenter v. Longan*, 16 Id. 271; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 285; *Collins v. Gilbert*, 94 Id. 753; *Brown v. Spofford*, 95 Id. 474, 478; *In re Tallassee Mfg. Co.*, 64 Ala. 593; *McCann v. Lewis*, 9 Cal. 246; *Fuller v. Hutchings*, 10 Id. 322; 70 Am. Dec. 746; *Sperry v. Spaulding*, 45 Cal. 544; *Mattheos v. Poythress*, 4 Ga. 287, 305; *Merchants' etc. Nat. Bank v. Trustees of Masonic Hall*, 62 Id. 271, 283; *Pettie v. Westlake*, 3 Scam. 535; *Mabley v. Ryan*, 14 Ill. 51; *Woodworth v. Hantoon*, 40 Id. 131; *Depuy v. Schuyler*, 45 Id. 306; *Palmer v. Nassau Bank*, 78 Id. 380; *Hall v. Allen*, 37 Ind. 541, 542; *Baldwin v. Pagan*, 83 Id. 447; *Wilkinson v. Sargent*, 9 Iowa, 521; *Trustees of Iowa College v. Hill*, 12 Id. 462; *Lathrop v. Donaldson*, 22 Id. 234; *Union Nat. Bank v. Barber*, 56 Id. 559; *Rahn v. King Wrought-iron Bridge Manufactory*, 16 Kan. 530; *Eaton v. Harlan*, 20 Id. 452; *Taylor v. Bowles*, 23 La. Ann. 294, 295; *Baxter v. Ellis*, 57 Me. 178; *Totten v. Buey*, 57 Md. 446; *Conley v. Winsor*, 41 Mich. 253; *Cummings v. Thompson*, 18 Minn. 246; *Craig v. City of Vicksburg*, 31 Miss. 216; *Emanuel v. White*, 34 Id. 56; 69 Am. Dec. 385; *Winstead v. Davis*, 40 Miss. 785; *Harrison v. Pike*, 48 Id. 46; *Horton v. Bayne*, 52 Mo. 531; *Corby v. Butler*, 55 Id. 398; *Johnson v. McMurtry*, 72 Id. 278; *Duncan v. Gilbert*, 29 N. J. L. 521; *Conroy v. Warren*, 3 Johns. Cas. 259; 2 Am. Dec.

156; *Case v. Mechanics' Banking Ass'n*, 4 N. Y. 166; *First Nat. Bank v. Green*, 43 Id. 298; *Ross v. Bedell*, 5 Duer, 462, 467; *French v. Barney*, 1 Ired. 219; *Pugh v. Grant*, 86 N. C. 39; *Fredwell v. Blount*, 86 Id. 33; *Davis v. Bartlett*, 12 Ohio St. 534; 80 Am. Dec. 375; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Brown v. Street*, 6 Watts & S. 221; *Snyder v. Riley*, 6 Pa. St. 164; 47 Am. Dec. 452; *Atlas Bank v. Doyle*, 9 R. I. 76; 98 Am. Dec. 368; *Jones v. Westcott*, 2 Brev. 166; 3 Am. Dec. 704; *Bliss v. Loggins*, 53 Tex. 121; *Ducerson's Adm'r v. Alsop*, 27 Gratt. 229, 248; *Middleton v. Bamed*, 4 Ex. 241.

Nor is this presumption overcome by evidence that the paper was executed without consideration between the original parties, or that the consideration has failed: *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327; *Hinkley v. Fourth National Bank*, 77 Ind. 475; *Ross v. Bedell*, 5 Duer, 462, 467; *Abrecht v. Strimpler*, 7 Pa. St. 476; *Hutchinson v. Boggs*, 28 Id. 294; *Gray's Adm'r v. Bank of Kentucky*, 29 Id. 365, 367; *Sloan v. Union Banking Co.*, 67 Id. 470; *Dingman v. Amsink*, 77 Id. 114; *Wilson v. Lamiar*, 11 Gratt. 477; *Whittaker v. Edmunds*, 1 Moody & R. 366; *Batley v. Catterall*, 1 Id. 379; *Jacob v. Hungate*, 1 Id. 445; *Lacey v. Forrester*, 2 Crompt. M. & R. 59; *Mills v. Barber*, 1 Mees. & W. 425; *Fitch v. Jones*, 5 El. & B. 238; but see *Heath v. Sansom*, 2 Barn. & Adol. 291; *Simpson v. Clarke*, 2 Crompt. M. & R. 342; nor by the fact that the maker of a note paid the amount thereof to the original payee, without notice that it had been transferred: *Emanuel v. White*, 34 Miss. 56; 69 Am. Dec. 385. The possession of a negotiable instrument, however, only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself: *Central Bank v. Hammett*, 50 N. Y. 159. It is held in a code state, where actions are to be brought in the name of the real party in interest, that the possession of an unindorsed promissory note, not payable to bearer, also raises a presumption that the person producing it on the trial was the real and rightful owner, and entitled to the money due from the maker: *Jackson v. Love*, 82 N. C. 406; *contra*, *Dorn v. Parsons*, 56 Mo. 601; and see *Gibson v. Miller*, 29 Mich. 355.

While the foregoing rule is well established, it is equally well settled that if the maker, acceptor, or other party bound by the original consideration of negotiable paper proves that there was fraud in the inception of the instrument, or circumstances raising a strong suspicion of fraud, the general presumption in favor of the holder is then overcome, and he is bound to show that he acquired the paper *bona fide*, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the fraud: *Smith v. Sac County*, 11 Wall. 139; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 285; *Collins v. Gilbert*, 94 Id. 753, 761; *McClintick v. Cummins*, 2 McLean, 98; *Wallace v. Branch Bank at Mobile*, 1 Ala. 565; *Thompson v. Armstrong*, 7 Id. 256; *Ross v. Drinkard's Adm'r*, 35 Id. 434; *Gilman v. New Orleans etc. R. R.*, 72 Id. 566; *Sperry v. Spaulding*, 45 Cal. 544; *Matthews v. Psychreas*, 4 Ga. 287, 305; *Merchants' etc. National Bank v. Trustees of Masonic Hall*, 62 Id. 271, 283; *Harbison v. Bank of Indiana*, 28 Ind. 133; 92 Am. Dec. 308; *Zook v. Simonson*, 72 Ind. 83; *Baldwin v. Fagan*, 83 Id. 447; *Mitchell v. Tomlinson*, 91 Id. 167; *Blair v. Buser*, 1 Wils. (Ind.) 333; *Lane v. Krekle*, 22 Iowa, 399; *Woodward v. Rodgers*, 31 Id. 342; *Rock Island National Bank v. Nelson*, 41 Id. 563; *Bank of Monroe v. Anderson Bros. Mtn. etc. Co.*, 65 Id. 692; *Morgan v. Yarrowborough*, 13 La. 74; 33 Am. Dec. 553; *Baxter v. Ellis*, 57 Me. 178; *Roberts v. Lane*, 64 Id. 106; 18 Am. Rep. 242; *Kellogg v. Curtis*, 69 Ma. 212; 31 Am. Rep. 273; *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327;

Tolson v. Bury, 57 Md. 446; *Crompton v. Perkins*, 65 Id. 22; *Bissell v. Morris*, 11 Osh. 198; *Tucker v. Morrill*, 1 Allen, 528; *Smith v. Livingston*, 111 Mass. 242; *Carrier v. Cameron*, 31 Mich. 373; 18 Am. Rep. 192; *Wright v. Irish*, 33 Mich. 32; *Conley v. Winsor*, 41 Id. 253; *Cummings v. Thompson*, 18 Minn. 246; *Horton v. Bayne*, 52 Mo. 531; *Hamilton v. Marks*, 63 Id. 167; *Johnson v. McMurry*, 72 Id. 278; *Perkins v. Prout*, 47 N. H. 387; 93 Am. Dec. 446; *Duncan v. Gilbert*, 29 N. J. L. 521; *Woodhull v. Holmes*, 10 Johns. 231; *Vallett v. Parker*, 6 Wend. 615; *Wardell v. Howell*, 9 Id. 170; *Case v. Mechanics' Banking Ass'n*, 4 N. Y. 186; *Farmers' etc. Nat. Bank v. Jones*, 45 N. Y. 762; *Ross v. Bedell*, 5 Duer, 462, 467; *Holme v. Kasper*, 5 Minn. 446; *Beltzhoover v. Blackstock*, 3 Watts, 20, 26; 27 Am. Dec. 330; *Albrecht v. Strimpler*, 7 Pa. St. 476, 477; *Hutchinson v. Boggs*, 28 Id. 294; *Gray's Adm'r v. Bank of Kentucky*, 29 Id. 365, 367; *Albiett v. Mellon*, 37 Id. 367; *Maple v. Browne*, 43 Id. 458; *Dingman v. Ameisk*, 77 Id. 114; *Pugh v. Grant*, 86 N. C. 39; *Davis v. Bartlett*, 12 Ohio St. 534; 80 Am. Dec. 375; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Brown v. Street*, 6 Watts & S. 221; *Snyder v. Riley*, 6 Pa. St. 164; 47 Am. Dec. 452; *Blum v. Loggins*, 53 Tex. 121; *Vathir v. Zane*, 6 Gratt. 246; *Wilson v. Lousier*, 11 Id. 477; *Whitaker v. Edwards*, 1 Moody & R. 386; *Mills v. Barber*, 1 Mees. & W. 425; *Smith v. Boine*, 16 Q. B. 244; *Harvey v. Towers*, 6 Ex. 656; *Berry v. Alderman*, 14 Com. B. 96; *Mather v. Lord Maidstone*, 1 Com. B., N. S., 273; *Hall v. Featherstone*, 3 Hurl. & N. 284; compare *Terry v. Taylor*, 64 Iowa, 35.

The reason of this rule is the presumption that the guilty party transferred the paper merely that he might recover on it in the name of a third person. And this being the reason of the rule, it would seem to be plain that the fraud to cast the onus on the holder need not necessarily have been in procuring the execution of the paper, or in putting it in circulation, but that it might have been a fraud subsequently committed in obtaining possession of the paper from the defendant, if he is sought to be held liable thereon, or from the plaintiff, if he is seeking to assert his title to the paper, as the case might be: See *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513; see, however, *Sloan v. Union Banking Co.*, 67 Pa. St. 470; but it would seem to be equally true, in the language of Chief Justice Dixon in *Kimney v. Krue*, 28 Wis. 183, that "the fraudulent putting in circulation of a negotiable instrument, which operates to change the burden of proof, and call upon the plaintiff to prove his title as a *bona fide* holder, is where this is done fraudulently as to the defendant or maker, and not where it is so done as to the payee or some intermediate holder or party to the paper"; but compare *President etc. of Fulton Bank v. President etc. of Phantus Bank*, 1 Hall, 562; *Hart v. Potter*, 4 Duer, 458.

It makes no difference, in the application of the rule requiring the holder to make this showing, what the form of the transfer to him may have been; that is, whether the paper was specially indorsed, or whether it was indorsed in blank: *Morgan v. Yarrowborough*, 13 La. 74; 33 Am. Dec. 553. The rule, however, is a rule of evidence, and not of pleading; and it is, notwithstanding, necessary for one who relies upon the element of fraud to make the appropriate allegations showing that the holder is not a *bona fide* holder, or that he gave no value, or took after maturity, or with notice: See *Olapp v. County of Cedar*, 5 Iowa, 15; 68 Am. Dec. 678; *Lane v. Krekle*, 22 Iowa, 399. In accordance with the proposition heretofore considered, it is sufficient for the holder to show either "that he himself, or any prior holder whose rights he has, came by the note fairly, for value, before maturity, without knowledge of the fraud, in the due course of business, unattended with any circum-

stances justly calculated to excite suspicion"; for "if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased when the note was overdue, or with a knowledge of its infirmity between the original parties": *Roberts v. Lane*, 64 Me. 108; 18 Am. Rep. 242.

It might be here noticed that the holder of a negotiable instrument is not only required to show that he took the paper *bona fide*, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the infirmity, where fraud in executing, obtaining, or circulating the paper is set up against him, but he must make a like showing when there is evidence that the instrument was given upon an illegal consideration: *Sistermans v. Field*, 9 Gray, 331; *Holden v. Osgrove*, 12 Id. 216; *Smith v. Edgeworth*, 3 Allen, 233; *Emerson v. Burns*, 114 Mass. 348, 349; *Paton v. Coit*, 5 Mich. 505; 72 Am. Dec. 58; *Swett v. Hooper*, 62 Me. 54; *Baxter v. Ellis*, 57 Id. 178; *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327; *Horton v. Boyne*, 52 Mo. 531; *Garland v. Lane*, 46 N. H. 245; *Whittaker v. Edmunds*, 1 Moody & R. 366; *Mills v. Barber*, 1 Mea. & W. 425; *Edmonds v. Groves*, 2 Id. 642; *Bailey v. Bidwell*, 13 Id. 73; *Bingham v. Stanley*, 2 Q. B. 117; *Fitch v. Jones*, 5 El. & B. 238; also in case of duress: *Clark v. Pease*, 41 N. H. 414; *First Nat. Bank v. Green*, 43 N. Y. 298; and see *Belthoover v. Blackstock*, 3 Watts, 20, 26; 27 Am. Dec. 330; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Albrecht v. Strimpler*, 7 Pa. St. 476, 477; *Gray's Adm'r v. Bank of Kentucky*, 29 Id. 365, 367; *Cummings v. Thompson*, 18 Minn. 246; and where the paper is shown to have been lost by or stolen from the true owner: *Devlin v. Clark*, 31 Mo. 22; and see *Belthoover v. Blackstock*, *Knight v. Pugh*, *Albrecht v. Strimpler*, *Gray's Adm'r v. Bank of Kentucky*, *Cummings v. Thompson*, *supra*.

It has been intimated by some authorities that under any of the foregoing exceptional circumstances the holder is also bound to prove affirmatively his want of notice of the infirmity: *Munroe v. Cooper*, 5 Pick. 412; *Aldrich v. Warren*, 16 Me. 465; *Perrin v. Noyes*, 39 Id. 384; 63 Am. Dec. 633; *Cottle v. Cleaves*, 70 Me. 256; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; *Michelberger v. Old Nat. Bank*, 103 Ind. 401; *Nickerson v. Rager*, 76 N. Y. 279; *McKesson v. Stanberry*, 3 Ohio St. 156; but this is requiring him to prove a negative; and while it must not appear from the showing he makes that he was chargeable with notice, yet the fact that he had actual notice must, according to the better opinion, be proved by the opposite party: *Hopgood v. Needham*, 59 Me. 442; *Swett v. Hooper*, 62 Id. 54; *Davis v. Bartlett*, 12 Ohio St. 534; 80 Am. Dec. 375; *Paton v. Coit*, 5 Mich. 505; 72 Am. Dec. 58; *Catlin v. Hansen*, 1 Duer, 309; *Hart v. Potter*, 4 Id. 458; *Ross v. Bedell*, 5 Id. 462, 467; *Kelly v. Ford*, 4 Iowa, 140; *Lake v. Reed*, 29 Id. 258; 4 Am. Rep. 209; compare *Union Nat. Bank v. Barber*, 56 Iowa, 559, 563.

It has been denied that any presumption at all is raised against the holder of a bank bill by a showing that it was stolen, or fraudulently put into circulation, such instruments passing from hand to hand as money, and not ordinarily subject to be identified by one who receives or passes them: *Worcester County Bank v. Dorchester etc. Bank*, 10 Cush. 488, 490; 57 Am. Dec. 120; *Wyer v. Dorchester etc. Bank*, 11 Cush. 51; 59 Am. Dec. 127.

SHAKESPEAR v. SMITH.

[77 CALIFORNIA, 688.]

SCHOOL DISTRICT — ORDER DRAWN ON COUNTY SUPERINTENDENT BY TWO TRUSTEES, ONE OF WHOM IS INTERESTED, IS VOID. — Order for a requisition drawn on the county superintendent of public schools by but two of the three trustees of a school district, one of whom is personally interested in the order, and therefore incompetent to act, is void for want of the sanction of a competent majority of the board of trustees, whether the interested trustee has acted fairly or unfairly in the matter.

SCHOOL DISTRICT — ORDER DRAWN BY TRUSTEES ON COUNTY SUPERINTENDENT IS NOT NEGOTIABLE INSTRUMENT. — Order for a requisition drawn on the county superintendent of public schools by trustees of a school district is not a negotiable instrument in the sense that an innocent holder for value is protected against infirmities in its origin.

PARTIES — JOINDER OF PARTIES DEFENDANT IN ACTION TO CANCEL ILLEGAL SCHOOL ORDER. — It is proper to join as parties defendant in an action by a taxpayer, to compel the cancellation of an illegal order for a requisition drawn on the county superintendent of public schools by the trustees of a school district, and to restrain the superintendent from drawing a requisition on the county auditor, the parties interested in the order, and the superintendent.

ACTION to compel the cancellation of an order for a requisition drawn by trustees of a school district on the county superintendent of public schools, and to restrain the superintendent from drawing a requisition on the county auditor. The opinion states the facts.

Dennis Spencer, W. F. Henning, and Garret W. McEnerney,
for the appellant.

F. E. Johnston, Wallace and Johnston, and Henry Hogan,
for the respondents.

SEARLS, C. J. This is an action by plaintiff as a taxpayer and resident of St. Helena school district No. 10, county of Napa, on his own behalf, and in behalf of all other taxpayers of said school district, for the surrender and cancellation, and to declare null and void, a certain order of W. A. C. Smith and C. N. Hale, two of the trustees of said school district, on the county superintendent of schools, in favor of George B. Kennedy or order, which said order, with the assignments and indorsements thereon, is in the words and figures following:—

"ORDER UPON THE COUNTY SUPERINTENDENT OF PUBLIC SCHOOLS.

"No. 294.

ST. HELENA, January 8, 1886.

"The county superintendent of public schools of Napa County will draw a requisition on the county auditor against

the special tax school fund for \$930.93 in favor of George B. Kennedy or order, on account of a contract for repairing school-house in full during the present school year in St. Helena school district.

"W. A. C. SMITH,

"C. N. HALE,

"School Trustees of St. Helena District.

"Indorsed: Pay to W. A. C. Smith or order.

"GEO. B. KENNEDY.

"Pay Bank of Napa or order, for collection.

"Account of W. A. C. SMITH."

The complaint shows that plaintiff and defendants W. A. C. Smith and C. N. Hale were trustees of the school district mentioned, and as such they, or a majority of them, contracted with the defendant George B. Kennedy to repair the school-house of their district, in consideration of which they agreed to pay \$892.51 on or before September 10, 1885, or in lieu thereof to give an order to the school superintendent for a like amount; that at the instance of the trustees, Kennedy performed certain extra labor upon the school-house which, added to the contract price, aggregated \$930.93, as specified in the foregoing order.

Upon the allowance of the order, plaintiff voted against, and defendants Smith and Hale for, such allowance.

On or before November 8, 1885, Kennedy sold, transferred, and assigned to trustee Smith his interest in the contract, and the proceeds to accrue therefrom, and said Smith was interested in the claim prior to and at the date of its allowance by the board of trustees.

The Bank of Napa, another of the defendants, is alleged to have an interest in the claim or order, and is therefore made a party defendant.

Defendant Shearer is the superintendent of schools for Napa County, and the complaint asks that he be enjoined from drawing any requisition upon the auditor of the county for payment, etc.

A demurrer was interposed by the defendants, upon the grounds, — 1. That the amended complaint does not state facts sufficient to constitute a cause of action; and 2. That Shearer and the Bank of Napa are improperly joined as defendants, and that C. N. Hale should have been made a party defendant.

The demurrer was sustained, and plaintiff declining to

amend, judgment was entered for defendants, and against the plaintiff, for costs.

In fact, there were separate demurrers by different defendants, but for convenience in reference we may treat them as one.

We are of opinion the demurrer should have been overruled.

The order in question was drawn by the concurrence of two only of the trustees, one of whom was interested in it, and being incompetent to act, it was void for want of the sanction of a competent majority of the board: *San Diego v. S. D. & L. A. R. R. Co.*, 44 Cal. 111; *Andrews v. Pratt*, 44 Id. 309; *Pickett v. School District*, 25 Wis. 552; 3 Am. Rep. 105.

In such cases the court will not pause to inquire whether a trustee has acted fairly or unfairly; being interested in the subject-matter, he may not, as a trustee, deal with himself, and thus be subjected to the temptation to advance his own interests. The order in question is not a negotiable instrument in the broad sense that an innocent holder for a valuable consideration is protected: *Argenti v. San Francisco*, 16 Cal. 256; *People v. Gray*, 23 Id. 126; *Martin v. San Francisco*, 16 Id. 286; *Kellor v. Hicks*, 22 Id. 457; *Dana v. City of San Francisco*, 19 Id. 486; *People v. Supervisors El Dorado*, 11 Id. 170.

Such an order, like county warrants, "acquires no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred, or in what faith they may have been transferred, or in what faith they may have been taken. If illegal when issued, they are illegal for all time": *People v. Supervisors El Dorado*, *supra*; see also Civ. Code, sec. 3095, for an enumeration of different classes of negotiable instruments.

The term "negotiable" is frequently used in a broad sense, to describe any written security which may be transferred by indorsement and delivery, or by delivery only, so as to vest in the indorsee the legal title, and thus to enable him to maintain in his own name an action thereon.

In this broad sense the instrument we are considering is a negotiable instrument, but not in the commercial and more restricted sense which applies the term only to such instruments as carry with them the legal title by indorsement or delivery, as well as, when transferred before maturity, the right

to recover their full face value, without reference to defenses affecting their validity.

It follows that, not being a negotiable instrument in the sense of the law merchant, the Bank of Napa is in no better position as a holder than Smith or Kennedy, under whom it holds.

There is no misjoinder of parties defendant.

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein": Code Civ. Proc., sec. 379. This section of the code adopts substantially the former rule in equity, under which not only parties interested in the cause of action, but also in the relief to be obtained, or who would be affected by granting or withholding such relief, were proper parties. Kennedy, Smith, and the Bank of Napa are directly interested according to the allegations of the complaint, and Shearer is interested in the relief sought in the question whether or not he shall be enjoined from drawing a requisition upon the auditor.

It may be proper to say that so far as appears from the complaint Kennedy has an honest claim against the school district, to the payment of which he and his assignees are entitled; that the only vice in the transaction consisted in its allowance by a party in interest, which raises an implication of fraud, and renders the order void.

Either Kennedy or his assignee, as the case may be, may still (unless prevented by the bar of the statute of limitations) present the claim to the board of trustees, and if properly allowed, it will become a legitimate claim as against the district; and if being a proper and just claim the board shall for any cause reject it, an action to establish its validity will be in order.

The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrers to the amended complaint.

NEGOTIABLE INSTRUMENTS, what are and what are not: *Township of Snyder v. Boscawell*, 122 Pa. St. 442; 9 Am. St. Rep. 118, and note 121; *Chandler v. Carey*, 64 Mich. 237; 8 Am. St. Rep. 814, and note 815.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

CRESCENT INSURANCE COMPANY v. BEAR.

[28 FLORIDA, 50.]

GARNISHMENT OF PARTNERSHIP. — A debt due a partnership cannot be garnished by a creditor of one of the partners, even when such debt is due for insurance on furniture used by the partners solely for gaming purposes, for which alone the partnership existed, especially when the other partner is not a party to the action, as the effect of such proceeding, if allowed, would be to annul the partnership and deprive such partner of what may be his rights in such debt, and to appropriate his property to the payment of another's debts without an opportunity to be heard.

PARTNERSHIP — ILLEGAL CONTRACT — ACCOUNTING. — When, in an illegal venture, profits may have been made, an account may be had in equity by one partner against the other, who has them and is seeking to appropriate them to himself, and when there has been a loss in the venture, an adjustment of accounts between the partners, and an obligation given by the debtor partner to the other, an action may be maintained on such obligation.

W. A. Blount, for the appellant.

John C. Avery and William Fisher, for the appellee.

RANEY, J. The appellee obtained judgment for \$331.40 against Louis C. Apley, and issued a writ of garnishment to appellant, who, in answer to the writ, set up that it was not at the time of the service thereof indebted to the defendant, Apley, "except in so far as he might be interested in an indebtedness of this garnishee of five hundred dollars then due to the firm of Wilkins and Apley, composed of the defendant and one James Wilkins, and that it has not since the service of the said garnishment been indebted to him nor them, as

aforesaid," etc. The reply or "traverse" to this answer is: "That the said five hundred dollars in said answer mentioned was and still is due said James Wilkins and defendant from the garnishee on account of a loss by fire of certain furniture owned by said Wilkins and defendant, and insured by the garnishee, which said Wilkins and the defendant used for the purpose of conducting a gaming business, and for no other purpose, and that except for such gaming purposes the defendant and Wilkins were not copartners." Appellant demurred to this reply, and the demurrer was overruled and final judgment entered against appellant.

The contention of the appellee is, in effect, simply, that as the furniture upon which the insurance money is due to Wilkins and the defendant, Apley, was used by them for the sole purpose of conducting a gaming business, and as, except for such gaming purposes, the defendant and Wilkins were not partners, the partnership rights and the *status* of Wilkins and Apley as partners are to be considered to have no existence, and consequently that they should be considered as tenants in common of the insurance money or debt due them by the insurance company.

The best considered authorities hold that a debt due a partnership cannot be garnished by a creditor of one of the partners. The garnishment laws afford no means for ascertaining such partner's interest, and they do not even make other partners parties; the interest of each partner in partnership funds is only what remains after the partnership accounts are taken; and unless upon such an account the partner be a creditor of the fund, he is entitled to nothing, and if the partnership be insolvent, the same result follows. The effects of the partnership may be wanted to pay its debts, and on a settlement of accounts, the particular partner to whose individual indebtedness it is sought to apply through garnishment a part of the debt due the firm may be found to be a debtor to the partnership. The conditions of the partnership and interests of the respective partners are unknown, and the ordinary machinery of a court of law is not only not adapted to the ascertainment of such condition and interests, but an attempt to make them so would prove not only anomalous, but also impracticable: Drake on Attachments, secs. 567-571.

It is true that a court of equity will not enforce an illegal contract, but this has not been regarded as necessarily involving the proposition that when the illegal venture has been

consummated, resulting in profit, and one of the parties to the project has appropriated to himself the results, that chancery would not call him to an account, and compel him to do justice to his excluded partner: *Brooks v. Martin*, 2 Wall. 70; *McBlair v. Gibbes*, 17 How. 132; *Sharp v. Taylor*, 2 Phill. Ch. 801, and cases cited.

In *De Leon v. Travino*, 49 Tex. 88, it was held that although a contract may be illegal, it does not follow that it is illegal or immoral for the parties to it, after its completion, to fairly settle and adjust the profits and losses which have resulted from it. The facts were, that during the late war between the states, parties in Brownsville, Texas, formed, in 1864, a partnership for the purpose of shipping merchandise from Matamoros, in Mexico, to Texas, with a view to obtaining cotton. Afterwards, in 1866, the parties, on settlement, adjusted their accounts, and one executed his notes to the others, and upon being sued, pleaded the illegality of the venture, but it was held that such illegality did not attach to the notes, and that it was no defense. The notes were given, not for profits, but in liquidation of the portion of losses and merchandise which on the settlement with De Leon was found to be due the appellees, Travino and Brother.

The authorities referred to maintain, not only that when in an illegal venture there have been profits made, an account may be had in equity of them by one partner against the other who has them and is seeking to appropriate them to himself, but also that where there has been a loss in the venture, and an adjustment of the accounts between the partners and an obligation given by the debtor partner to the other, that an action may be maintained on such obligation.

It seems to us that not only are we asked to assume that no relief can ever be given by the courts to one partner should he claim that he is entitled as against the other to more than half of the fund, where the purpose or business of the partnership is illegal, but also to assume in this case, from the mere allegation of an illegal purpose or character of business, that Apley will contest Wilkins's right to more than half, even if it be that the latter is in fact entitled to more, instead of amicably yielding to him the entire fund, if it be that Wilkins is entitled to it. We do not know, nor can we learn in this proceeding, whether Wilkins is entitled to half or more or to all of this indebtedness of the insurance company, nor whether Apley contests his claim, whatever it may be. Wilkins can-

not be heard, either by himself or through another, to assert his claim, whatever it may be, nor to contest the alleged illegality of the partnership. The pleadings admit that a partnership has in fact been formed, and its actual existence; that the insurance contract was made with Wilkins and Apley as partners; and that the insurance money is regarded by the company to be due to them as partners; but the appellee seeks to invalidate the rights of Wilkins as a partner by an allegation of an illegal purpose or character of the business, and this in a proceeding to which Wilkins is not a party, and thus to annul the partnership, and deprive him of what may be his rights in the money, and to appropriate his property to the payment of another's debts, without an opportunity to be heard. This cannot be done, even if it be true that equity should not grant relief, as was done in *Brooks v. Martin*, *supra*, and other cases cited. To sustain this garnishment is to condemn Wilkins as to his rights in the partnership without an opportunity to be heard, and it may be take his property without due process of law.

The judgment is reversed, and the case will be remanded, with directions to enter judgment sustaining the demurrer.

ATTACHMENT. — The interest of a joint contractor in the hands of a trustee may be reached by a foreign attachment, although the effect will be to sever the liability: *Whitney v. Munroe*, 19 Me. 42; 36 Am. Dec. 732. The undivided interest of a tenant in common of chattels may be seized and sold by an officer under attachment, if the property is severable; and if the tenant's share is exempt from such seizure, he may maintain his action alone to vindicate his exemption rights: *Newton v. Howe*, 29 Wis. 531; 9 Am. Rep. 618. A debt due an existing partnership whose affairs are unsettled is not subject to attachment at the suit of one of the partners: *People's Bank v. Shryock*, 48 Md. 427; 30 Am. Rep. 476.

DOYLE v. WADE.

[23 FLORIDA, 90.]

ESTATE OF DECEDENT. — Heirs at law cannot bring ejectment to recover real estate belonging to their ancestor while there is an administrator of such estate to whom letters have been duly issued, and the administration of such estate is incomplete and unsettled.

JUDGMENT LIEN. — JUDGMENTS OF UNITED STATES COURTS are liens on any lands of defendant situate within the district over which the court has jurisdiction; and state statutes requiring judgments to be recorded in the county in which the land lies have no effect upon the lien of a judgment of a United States court.

LAW OF CASE. — Where a ruling is made in a case by the appellate court, it becomes the law of that case, and cannot be reviewed at a subsequent term.

PLEADING AND PRACTICE. — Section 21, page 734, McClellan's Digest of Florida Statutes, providing the time within which a new action may be commenced, when judgment for plaintiff has been reversed for error, or when verdict and judgment for plaintiff has been arrested, has no application where the plaintiffs in the suits are not the same, or where the plaintiff in the first suit discontinued his action.

WHEN STATUTE OF LIMITATIONS has once commenced to run, no subsequent disabilities can check or impede it.

EXECUTIONS — PURCHASER — NOTICE. — Where a judgment creditor has neither actual nor constructive notice of a prior unrecorded deed, it is of no consequence whether the purchaser at an execution sale under such judgment has notice of such deed or not.

ADVERSE POSSESSION. — Where a party is in actual occupancy of a part of the land in dispute, claiming the whole tract by adverse possession, he must show that his claim of title is founded on an instrument in writing to the whole of the disputed premises of which the portion occupied is a part.

POSSESSION TO BE ADVERSE MUST BE CONTINUOUS. — A voluntary and intentional abandonment, without intention of returning and retaking possession, no matter how short, destroys adverse possession; but what is continuity of possession must to a great degree rest upon and be determined by the circumstances of each case, as the condition of the property, the uses to which it is adapted or employed, the circumstances and situation of the possession, and the possessor's intention in regard to it.

JUDGMENT LIEN — NOTICE. — A judgment is a lien on real estate which has been previously conveyed by an unrecorded deed, of which the judgment creditor did not have actual notice at the time that the judgment was entered.

JUDGMENT LIEN — NOTICE. — Where a judgment creditor has no notice, actual nor constructive, of a prior, unrecorded deed, his lien is complete, and a purchaser at a sale thereunder takes such title as the records show to be in the judgment defendant, without regard to whether the purchaser had notice or not.

PURCHASER WITH NOTICE from a purchaser without notice takes a good title.

ESTOPPEL — OUTSTANDING TITLE. — Where both parties claim title to land from a common source, defendant is estopped from setting up an outstanding title with which he is disconnected.

Fleming and Daniel, and J. W. Price, for the appellant.

Andrew Johnson, for the appellees.

THE CHIEF JUSTICE. This is a suit in ejectment by the heirs at law of James Weeks for the recovery of a tract of land in the county of Orange.

The defendant pleads that letters of administration were granted to Stephen Weeks on the estate of said James Weeks

before the commencement of this suit, and that said Stephen Weeks was, at the commencement of the suit, and was at the time of the filing of said plea, administrator of said estate, and that said estate remains unsettled. The plea was demurred to, and raises the question as to the right of the heirs at law to bring an action for the recovery of real estate belonging to their ancestor at the time of his death, while there is an administrator of said estate to whom letters have been duly issued, and the administration of said estate is incomplete and unsettled. By the act of 1833 and of 1870, real estate of a decedent is made assets in the hands of an administrator or executor. Construing the act of 1833, this court, in the case of *Gilchrist v. Filyau*, 2 Fla. 94, says: "Here we see all distinctions known to the English law between the real and personal estate as to being assets in the hands of the executor or administrator done away. This distinction being once established, the same rights, duties, and liabilities, as to both would seem to be the necessary result and consequence." In *Sanchez v. Hart*, 17 Id. 507, the court, after reciting the acts of 1833 and 1870, and the statutes authorizing the administrator to convey to the bargainer any real estate which his intestate had entered into a written agreement to sell, and of 1866, authorizing the administrator, with the sanction of the probate judge, to hire laborers and cultivate the land of the deceased, and referring to the case of *Gilchrist v. Filyau*, *supra*, and also the case of *Union Bank v. Powell's Heirs*, 3 Fla. 175, 52 Am. Dec. 367, says: "It is impossible to reconcile these decisions and statutes with the view that the heir is entitled to the possession of the real estate, as against the administrator, during the settlement of the estate." Further: "We think these statutes give to the administrator the right to take possession of the real estate of the deceased while the estate is in process of settlement, and the right of the heir is subordinate to his possession."

Ordinarily, we would, after deciding that there were not proper parties to a suit, decline to pass upon any of the other questions raised in the record; but in this instance, as it is virtually the title of James Weeks which is in issue, and the question being only as to who shall represent such title, we feel justified in holding that this case is an exception to the rule, and will express our opinion on the questions which we think will arise in another trial.

Two judgments were recovered in the United States court

at St. Augustine against one Aaron Jernigan on the respective dates of April 2 and April 6, 1860. The tract of land in dispute was levied on and sold by the marshal on the first Monday in July of the same year, at which sale Askew and Brock became the purchasers. The defendant claims title by deed from said Askew and Brock. The land is situated in Orange County, and the judgments aforesaid were not recorded in said county. The plaintiffs claim title as the heirs of James Weeks, deceased, who received a deed therefor from Jernigan on the sixteenth day of February, 1860, but which was not recorded until April 16, 1860. Counsel for appellees insist that as the judgments were rendered in St. Johns County and were not recorded in the county of Orange, where the land was situate, the said judgments were not a lien on said lands, under our statute of February 12, 1834: McClellan's Digest, p. 619, sec. 2. The judgments were rendered in the United States court, and the county of Orange was a part of the district over which said court had jurisdiction. We are of the opinion that the judgments of the courts of the United States became a lien on any lands of the defendant lying anywhere within the district over which the court has jurisdiction, and that state statutes requiring judgments to be recorded in the county in which the land lies have no effect upon a lien of a judgment of the United States courts. This has been expressly decided in 1 Abb. 474.

It is claimed by the counsel for the defendant below that he took possession of the land in controversy in the year 1860, and in the lifetime of James Weeks; that Weeks died in the year 1865. This suit was instituted "in the month of September, 1878," as the record shows. The court below charged the jury "that in calculating the period of adverse holding by the defendant you shall exclude the time which elapsed from the 13th of December, 1861, up to the 27th of February, 1872."

This court, in the case of *Spencer v. McBride*, 14 Fla. 403, and in this same case when here at the January term of 1880, has construed the statute of limitations, together with section 19 of the act of 1872, in language which it would seem almost impossible to misunderstand, and that construction is the law of this case. If the claim of defendant below (we express no opinion on the evidence, as the case must be tried again), that he took adverse possession of the land in 1860, is true, then, by the operation of section 19 of the act of 1872, the

representatives of Weeks could bring the action within six months from the 27th of February, 1872, and if they failed to bring it within said time, it was barred by said act.

The record shows that a suit was commenced by Stephen Weeks, as administrator of James Weeks, deceased, against the defendant for the land in controversy, on the twenty-seventh day of April, 1874, which suit was discontinued on the 29th of May, 1878. The present suit was instituted by the heirs of Weeks in September following. The court further charged the jury that in calculating the period of adverse holding by the defendant, they should consider the commencement of this suit as dating from the twenty-seventh day of April, 1874. This charge was erroneous. Counsel for appellees cite in support of it the following act, McClellan's Digest, p. 734, sec. 21: "If in any action or suit judgment be given for the plaintiff, and the same be afterwards reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, in all such cases the party plaintiff, his heirs, executors, or administrators (as the case shall require), may commence a new action or suit from time to time within one year next after such judgment reversed, or such judgment given against the plaintiff, and not after." It has no application to the case here presented. The parties plaintiff in the two suits are not the same. There was no judgment for the plaintiff which was afterwards reversed on error, nor a verdict for plaintiff, and upon matter alleged in arrest of judgment, judgment given against the plaintiff. So far as we are advised, it was a voluntary discontinuance of his suit by Stephen Weeks.

The court also charged the jury that if they found, from the evidence, that any of the plaintiffs were married women or under the age of twenty-eight years, April 27, 1874, the date of the commencement of the suit against such plaintiffs, there can be no adverse possession, no matter how long the property may have been held against them, if you do not believe that this statute began to run against Weeks in his lifetime. Fixing the age at twenty-eight years we suppose was intended to allow seven years after coming of age. This charge was also erroneous, for the reasons given above, to wit, fixing the time when the statute began to run from the 27th of April, 1874. If it be true, as defendant below claims, that he took adverse possession of the land in 1860, in the lifetime of the ancestor

of plaintiffs, and through whom they claim, the statute began to run from that date against their ancestor, and no subsequent disabilities of the plaintiffs, nonage or coverture, could check or impede it. This question also was decided by the court in this case at the January term, 1880, and is also the law of this case.

The court also instructed the jury that if Askew or Brock, or either, had actual or constructive notice that Jernigan had sold the property to James Weeks prior to the marshal's sale, then it was the duty of the purchaser to inquire what interest Jernigan had in the property. This charge was erroneous. It was of no consequence whether the purchaser at the marshal's sale had actual notice of the deed from Jernigan to Weeks, unless it was shown that the plaintiff in the judgment had at the time of the rendition thereof notice of such deed.

If the plaintiff in the judgment when it was rendered had notice of the deed from Jernigan to Weeks, then no lien by virtue of such judgment attached to the land.

The rule is established in this state that a judgment is a lien on real estate which has been conveyed by deed by the defendant in execution prior to the rendition of the judgment, but which was not recorded, and of which the judgment creditor did not have actual notice at the time of entering such judgment. If the judgment creditor had no notice of the deed, either actual or constructive, his lien was complete, and a purchaser at a sale thereunder would take such title as the records showed to be in the defendant in the judgment, without regard to whether the purchaser had notice of it or not. If the creditor had fixed a lien on the real estate, its validity could not be impaired by depriving any person of the right to purchase at a sale under it. A purchaser with notice from a purchaser without notice takes a good title: See *Carr v. Thomas*, 18 Fla. 736; *Eldridge, Dunham, & Co. v. Post*, 20 Id. 579; see also *Devendell v. Hamilton*, 27 Ala. 155; *Jordan v. Mead*, 12 Id. 247; *Daniels v. Sorrels*, 9 Id. 436.

Defendant asked the court to instruct the jury that the "plaintiff must prove the location of the premises, and that the lands of which their ancestor was seised are the identical lands described in the declaration." This was a correct statement of the law, and should have been given.

Defendant also asked the court to instruct the jury: "If you find, from the evidence, that the defendant has been in actual occupancy of a part of the premises adversely, and

under color or claim of title, and that he and those holding and claiming under him have, during the period of such occupancy, usually improved or cultivated other portions of the land, building houses and barns, and planting fruit and ornamental trees thereon, the court charges you that this, under the statute, is sufficient to establish adverse possession of the whole tract." There was no error in refusing this instruction. The statute specifies upon what such claim of title shall be founded, to wit: "Upon a written instrument as being a conveyance of the premises in question." This not only defines the kind of "claim to title" which is protected by the statute, but also contemplates that such instrument should be a conveyance of all the premises in question. The instruction is based upon the predicate that the defendant "has been in possession of a part of the premises, and under color or claim of title." We can only infer from this that the claim of title was to the part of the premises actually occupied. The defendant must show that his claim of title was founded on an instrument in writing to the whole of the premises in question, and a charge which curtails it would be erroneous.

The judge charged the jury that there must be no moment of time when such possession is broken up or discontinued. It would be difficult, if not impossible, to prescribe in advance what lapse of possession by the occupant would destroy its continuity. A voluntary and intentional abandonment of the premises without intention of returning or retaking possession, no matter for how short a time, would be such a breach of continuity of possession as would render inoperative the defense of adverse possession. As to what is a continued occupancy and possession must in a great degree rest upon and be determined by the special circumstances of each case, in the determining of which the condition of the property, the uses to which it is adapted or employed, the circumstances and situation of the possession, and his intentions in regard to it, should all be considered: *Webb v. Richardson*, 42 Vt. 465.

In the course of the trial, the defendant offered evidence to show that the title to the property in suit was in a third party, to wit, William Travers. The plaintiff objected on the ground that the defendant and plaintiff deraigned their title from a common source, to wit, from one Aaron Jernigan. We think this objection a good one. If it be true, and as we have said we express no opinion on the evidence, that plaintiffs claim

title through a deed to their common ancestor, James Weeks, from Aaron Jernigan, and the defendant claims title through a purchaser at a sale of the property under a judgment against said Jernigan, they claim title from a common source. Without passing upon the question as to the right of a defendant in an ejectment suit to set up an outstanding title with which he does not connect himself, we think it clear that where both parties claim title to land from a common source that the defendant is estopped from setting up an outstanding title with which he is disconnected: 3 Wait's Actions and Defenses, 17, 18; *Union Bank v. Manard*, 51 Mo. 548. When both parties claim under a common source of title, they mutually admit the title in the person from whom they claim to be good, and neither of them need go further back than such title: 52 Pa. St. 492; *Gantt v. Cowan*, 27 Ala. 582; *Pollard v. Cocke*, 19 Id. 188.

We do not think it necessary to express an opinion on the question as to the admissibility of a certified copy of a deed in evidence. The constitution lately adopted contains a provision on this subject which will govern this question at another trial.

The judgment is reversed, and the cause remanded.

HEIRS — EJECTMENT. — Heirs at law of deceased persons can maintain ejectment to recover possession of land of which their intestate ancestors died seised: *Murdock v. Mitchell*, 30 Ga. 74; 76 Am. Dec. 409; *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49; see also monographic note to *Hubbard v. Ricart*, 23 Id. 200-203; note to *Easterling v. Blythe*, 56 Id. 48.

JUDGMENT LIENS. — Judgments of the circuit court of the United States for the district of Ohio rendered prior to May, 1828, attached as liens upon the lands of the defendants: *Sellers v. Corwin*, 5 Ohio, 398; 24 Am. Dec. 301. Lien of a judgment extends to all land owned by the judgment debtor within the state: *Campbell v. Spence*, 4 Ala. 543; 39 Am. Dec. 301.

APPEAL — LAW OF THE CASE. — Decision of the court upon a former appeal becomes the law of the case: *Goodman v. Walker*, 30 Ala. 482; 68 Am. Dec. 134; *Frisby v. Parkhurst*, 29 Md. 58; 96 Am. Dec. 503; *City Council v. Gibser*, 33 Ala. 116; 70 Am. Dec. 562. And where a case is brought before the supreme court a second time, nothing is before the court for adjudication but the proceedings in the case subsequent to the mandate: *Fortenberry v. Frazier*, 5 Ark. 200; 39 Am. Dec. 373. The appellate court is bound to take cognizance of its own decisions; and in cases so intimately associated that one is a necessary incident of the other, the decree in one should be so framed as to give effect to the decree in the other, and thereby save litigants unnecessary costs and delay: *Hubbs v. Kaufman*, 40 La. Ann. 320. The appellate court will not on a second appeal review or reverse a decision made on a prior appeal of the same case: *Heffner v. Brownwell*, 75 Iowa, 341; *Adams County v. Burlington etc. R'y Co.*, 55 Id. 94. The correctness of an opinion

filed by the appellate court may be reviewed upon a petition for rehearing, but not on a second appeal in the same case: *Windsor v. Cobb*, 74 Id. 709. An opinion of the appellate court determining a case upon two distinct and sufficient grounds is to be treated, when cited as authority, as decisions on both questions, not as *dicta* on either: *Bates v. Taylor*, 87 Tenn. 319. In cases where a writ of error will lie to the supreme court of the United States, the decisions of that court will be followed in preference to the former decisions of the appellate state court: *San Benito County v. Southern Pac. R. R. Co.*, 77 Cal. 518.

STATUTE OF LIMITATIONS. — When the statute of limitations once begins to run, no subsequent disability will stop it: *Faymonaz v. Prather*, 1 Nott & McC. 296; 9 Am. Dec. 691; *Ruff v. Bull*, 7 Har. & J. 14; 16 Am. Dec. 290; *Adamson v. Smith*, 2 Mill Const. 269; 12 Am. Dec. 669; *Fitzhugh v. Anderson*, 2 Hen. & M. 289; 3 Am. Dec. 625; *Jackson v. Moore*, 13 Johns. 513; 7 Am. Dec. 398; *McCrea v. Purnot*, 16 Wend. 460; 30 Am. Dec. 103; *Edward v. University*, 1 Dev. & B. Eq. 325; 30 Am. Dec. 170; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; 28 Am. Dec. 464; *Nicks v. Martindale*, Harp. 135; 18 Am. Dec. 647; *Smilie v. Bisle*, 2 Pa. St. 52; 44 Am. Dec. 156; *Stevenson v. McReary*, 12 Smedes & M. 9; 51 Am. Dec. 102; *Bensell v. Chancellor*, 5 Whart. 371; 34 Am. Dec. 561; *Dugan v. Gettings*, 3 Gill, 138; 43 Am. Dec. 306; *Kutler v. Hereth*, 75 Ind. 177; 39 Am. Rep. 131; *Comens v. Farnam*, 30 Ohio St. 491; 27 Am. Rep. 470; *Piper v. Hoard*, 107 N. Y. 67; 1 Am. St. Rep. 785, and note 789.

PURCHASERS WITH NOTICE from purchasers without notice take good title: See cases cited in the principal case.

ADVERSE POSSESSION. — To render possession adverse, it must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to unmistakably indicate an assertion of claim of exclusive ownership by the occupant: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, and note 74; *Colvin v. Republican Valley etc. Co.*, 23 Neb. 75; 8 Am. St. Rep. 114, and note 118; *Woods v. Montevallo etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Cook v. Clinton*, 64 Mich. 309; 8 Am. St. Rep. 816, and note 821; *Illinois etc. R. R. Co. v. Houghton*, 126 Ill. 233; 9 Am. St. Rep. 581, and note 586; compare *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474, and note 475; note to *Tex v. Pflug*, 8 Am. St. Rep. 233. The possession must be under claim or under color of title inconsistent with the claim or title of the true owner; but it need not be under a rightful claim, nor even under a muniment of title: *Illinois etc. R. R. Co. v. Houghton*, *supra*. Naked possession, unaccompanied with any claim of right, does not constitute a bar, but inures to the benefit of the real owner: *Colvin v. Republican Valley etc. Co.*, *supra*. When one enters upon land under color of title and with claim of ownership, any acts of user which are continuous, and indicate unequivocally to the neighborhood in which the land is situated that it is appropriated exclusively to his individual use and ownership, are sufficient to render the possession adverse: *Murray v. Hudson*, 65 Mich. 670. Adverse possession must not only be exclusive and uninterrupted, but also hostile to any other use or possession: *Huston v. Bybee*, 17 Or. 140. To make a case of adverse possession which will be recognized as equivalent to title, it must have been continued for the statutory period under the original hostile entry; and each succeeding occupant must show title under his predecessor, and his possession be referable to such entry: *Will v. St. Paul etc. R'y Co.*, 38 Minn. 122. Actual, exclusive occupancy or use of realty, evidenced by inclosure, is but

prima facie evidence of adverse possession; and whether it is really adverse possession depends upon the intention with which the occupant took his possession: *Hafendorfer v. Gault*, 84 Ky. 124; see also *Perry v. Burton*, 126 Ill. 389; *Price v. Town of Breckenridge*, 92 Mo. 378.

ADVERSE POSSESSION.—The question of adverse possession is one for the jury, in view of all the circumstances in evidence, and it would be error to withdraw it from their consideration: *Woods v. Montevallo etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Hacker v. Horlemus*, 69 Wis. 280.

ADVERSE POSSESSION — POSSESSION OF A PART ONLY OF A WHOLE TRACT. — Possession of a part of a tract under a claim of the whole, by one having a deed to the whole, no other party being in possession, extends the possession of the part to the possession of the whole: *Russell v. Harris*, 38 Cal. 426; 99 Am. Dec. 421, and note; see full and extended note on the actual possession of a part only of a whole tract as affecting title by adverse possession to the whole, *Taylor v. Buckner*, 12 Id. 357-359; compare *Heavner v. Morgan*, 30 W. Va. 335; 8 Am. St. Rep. 55.

ESTOPPEL. — When both parties claim title under the same person, neither of them can deny his right, and as between them, the elder is the better title, and must prevail; hence the estoppel of the grantor to deny his grantee's title, arising from his deed, extends to all persons claiming from or under the grantor by subsequently acquired title, whether by deed or otherwise: *Schnollback v. Chicago etc. Ry Co.*, 69 Wis. 292; 2 Am. St. Rep. 740, and note 744.

STATE EX REL. LILIENTHAL V. DEANE.

[28 FLORIDA, 121.]

ELECTION — SCRATCHED BALLOT — MANDAMUS. — Where there is enough on the face of the ballot to call for the exercise of judgment by the election inspectors as to whether it was "scratched," and they, so exercising their judgment, decide that it is "scratched," and should not be counted, such decision cannot be reviewed or controlled by *mandamus*.

W. R. Yates, George Wheaton Deane, and William Scott, for the relator.

Charles Swayne, for the respondents.

RANEY, J. This court, in the exercise of its original jurisdiction, issued an alternative writ of *mandamus* to the respondents, the three inspectors at an election lately held in the city of Sanford for the office of mayor and other municipal offices. The issue presented by the pleadings, including the returns of two of the inspectors and the traverse thereof, is whether or not the name of Henry L. Lilienthal, the relator, who was one of the two candidates for mayor, was, as it appeared upon one of the ballots voted at such election, "scratched." The respondents, Deane and Whiteman, say in their returns that it was scratched, and in the exercise of

their judgment as to whether it was or not, they decided that it was, and refused to count it as a vote for relator. The other inspector files a separate return, to the effect that he was in favor of counting the ballot. Two of the inspectors, being introduced as witnesses, identified the ballot in question, which was also put in evidence. There appear upon its face, across the name of the relator, several pencil marks or lines, which, though dim, are plainly visible, and there are two small holes in the ballot, one through the first or given name, and the other in or just under the surname, and both seemingly made with the pencil in making the marks or lines referred to. Whether or not it was the purpose of the person who cast this ballot to vote for the relator is not necessary for us to decide. There is enough upon the face of the ballot to call for the exercise of judgment by the inspectors upon this point, and exercising, as under the circumstances they had the right to do, their judgment as to whether the ballot should or should not be counted by them for the relator, they have decided that it should not be, or in other words, they have held it to be "a scratched ballot" in so far as the election for mayor was concerned, and have refused to count it. In this proceeding, we cannot control their discretion or judgment, or substitute ours for theirs: High on Extraordinary Legal Remedies, secs. 24, 34, 42.

The judgment will be, that the respondents go without day, and that they recover their costs: High on Extraordinary Legal Remedies, sec. 526; *State ex rel. Edwards v. County Commissioners Sumter County*, 22 Fla. 370.

It will be so ordered.

ELECTIONS. — The duties of election boards being merely ministerial, their omissions or mistakes can have no controlling influence on the election: *People v. Van Cleve*, 1 Mich. 382; 53 Am. Dec. 69.

MANDAMUS. — Public officers charged with specific ministerial duties in elections may be compelled by *mandamus* to perform such duties: *State ex rel. v. Houston*, 40 La. Ann. 393; 5 Am. St. Rep. 532. Compare *Wood v. Strother*, 76 Cal. 545; 9 Am. St. Rep. 249, and note 257, 258.

WILLIAMS v. McFADDEN.

[23 FLORIDA, 143.]

VENDOR AND VENDEE. — MISREPRESENTATIONS made by the vendor as to a material fact, knowing at the time that it was false, and upon which the vendee relies, are actionable.

VENDOR AND VENDEE. — MISREPRESENTATIONS made by the vendor which are tantamount to an estimate or opinion, such as value, condition, character, adaptability to certain uses, or the like, are not actionable, unless the seller resorts to some fraudulent means to prevent the purchaser from examining the property.

VENDOR AND VENDEE — FALSE REPRESENTATIONS — PLEADING. — In an action for damages for false representations by a vendor, the vendee must allege that such representations were material, made with knowledge that they were false, and that he relied upon and was misled by them.

VENDOR AND VENDEE. — RULE OF DAMAGES FOR FALSE REPRESENTATIONS in the sale of land is the difference between its actual value, and its value if the alleged facts regarding it had been true.

VENDOR AND VENDEE — MISREPRESENTATIONS. — The fact that the vendee took possession of the land, and had other transactions with the vendor without expressing dissatisfaction, does not estop him from bringing an action for false representations made by the vendor in the sale of the land.

VENDOR AND VENDEE — FALSE REPRESENTATIONS — EVIDENCE. — Where the vendor has made a written description of land and placed it in the hands of his agent, and referred the vendee to it as a correct description of the property before the sale, such writing is admissible in evidence as a representation as to the land.

VENDOR AND VENDEE — FALSE REPRESENTATIONS. — Where a vendor makes false representations concerning land sold, believing them to be true, he cannot be held responsible in an action on the case for deceit.

VENDOR AND VENDEE — FALSE REPRESENTATIONS QUESTION FOR JURY. — The fact of the knowledge of the vendor as to the truth or falsity of his representations in the sale of land is for the jury.

Taylor and Sanchez, for the appellant.

J. J. and S. Y. Finley, for the appellee.

THE CHIEF JUSTICE. The appellee sued the appellant in an action on the case upon the following facts as alleged in the declaration: The defendant, Williams, was the owner of a farm in the state of Florida. The appellee, McFadden, was the owner of a farm in the state of Kentucky; Williams had seen and examined the farm of McFadden in Kentucky; McFadden had never seen the farm of Williams; Williams made a description of his farm in writing, and placed it in the hands of his agent, and referred McFadden to it as a correct description of the property. The description is as follows: "Pooser farm. . . . Forty acres land, thirty acres in cultivation; dwelling-house with six rooms and four (4) fire-places; house

thoroughly finished and in good condition. Barn, stables, etc., complete and ample for general purposes in Florida; about one hundred orange-trees in bearing in the yard around the dwelling; grape-fruit and bananas in full bearing; lemons, citrons, pecans, pomegranates, peach and apple trees growing upon the place, some bearing and others to bear; about five hundred young orange-trees in nursery from two to six years old, ready to be put in ground; two fine springs of good water in the field; good well in yard; projected railroad line runs through horse-lot. Quality of land good, oak and hickory, produces fifteen bushels corn and five hundred pounds sea-island cotton to the acre without the use of fertilizers. This yield could be doubled by the liberal use of fertilizers. One mile from church and two miles from school; location healthy and society good." The declaration alleges that, believing the statements therein contained to be true, he made an exchange of his farm in Kentucky for defendant's farm in Florida, receiving at the time from defendant five hundred dollars, which was the agreed difference of value of the two places. The declaration alleges that defendant knowingly and willfully misrepresented and misdescribed said Florida land; that said representations were untrue "in respect to the number and character of the orange-trees, and in regard to the dwelling-house, and in regard to the character of the land." The defendant demurred to the declaration. We think the demurrer should have been sustained.

In the case of *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315, the court says: "The cause of action thus set forth must be treated as an action on the case for deceit founded upon false affirmations respecting real estate of which the defendant was the seller. The affirmations here set forth, as between buyer and seller, it has been repeatedly decided, will not support an action, although the defendant knew them to be false when made. They concern the value of the land or its condition and adaptation to particular uses, which are only matters of opinion and estimate, as to which men may differ. To such representations the maxim *caveat emptor* applies. The buyer is not excused from an examination, unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only"; citing *Gordon v. Parmelee*, 2 Allen, 212;

Brown v. Castles, 11 Cush. 348; *Vesey v. Daton*, 3 Allen, 380. In the case of *Gordon v. Parmelee*, *supra*, the court says: "The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defense to the notes. They fall within that class of affirmations which, although known by the party making them to be false, do not, as between vendor and vendee, afford any ground for a claim of damages, either in an action on the case for deceit, or by way of recoupment in a suit to recover the purchase-money. They come within the principle embodied in the maxim of the civil law, *Simplex commendatio non obligat*. Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land, or its adaptation to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them; and if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property."

"To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of the contract which will render it void or enable the aggrieved party to maintain an action for deceit. It must be as to mat-

ters of fact substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation": 3 Sutherland on Damages, 484, 485; *Long v. Woodman*, 58 Me. 49.

The law, we think, is correctly stated in the cases cited above. A misrepresentation made by a seller as to a material fact, knowing at the time that it was untrue, upon which the purchaser relies, is actionable. A statement made by the vendor which is tantamount to an estimate or opinion, such as value, condition, character, adaptability to certain uses, is not actionable, unless the seller resorts to some fraudulent means to prevent the purchaser from examining the property. We have examined the various cases in the brief of the appellee, some of which decide that where representations are made by the seller as to matter of opinion of property which is situated in another state hundreds of miles away, and of which a personal examination by the purchaser would be inconvenient and expensive, are exceptions to the last rule, the courts holding that under such circumstances the purchaser was guilty of no negligence in not examining the land, and relying on the statements of the seller. These are mostly recent cases, and limit the application of the doctrine of *caveat emptor* to transactions where the examination of the land would suit the convenience of the purchaser, and was not attended with expense. This salutary rule cannot, in our judgment, be abridged in such a manner without a violation of old and well-established principles of law. Some of the other cases cited by appellee very plainly lose sight of the distinction between statements of fact and mere opinions. When a seller asserts the existence of a fact, there is no room for the exercise of judgment, observation and memory being the only faculties employed. A misstatement by him can be easily detected. The law permits a purchaser to rely on such statements, for the reason that the existence or non-existence of the alleged facts, being easily susceptible of proof, furnish a test of the good faith of the seller. On the contrary, human opinion is so various and discordant, and what it really is is so difficult of proof, that the law permits great latitude of statements which are properly traceable to it. We do not mean to say that there are not statements professedly of opinion as to the number of certain things sold, which, when grossly erroneous, would repel the conclusion that it was a matter of opinion, and would amount to a statement of fact. The rep-

representations which plaintiff alleges to be untrue are: 1. "As to the number and character of the orange-trees." This is not sufficiently definite. If the plaintiff claims that the number of orange-trees in the first description of orange-trees in the advertisement was so small in comparison with the number alleged by defendant that it was plain that the defendant was making a gross misstatement of a fact, and that it was impossible for him to have entertained the opinion as to the number, the declaration should have stated the exact number. Again, the allegation as to the "character of the orange-trees." This, as stated, would be matter of opinion. If the plaintiff meant that they were not "bearing trees," he should have so alleged. The assertion that a tree is bearing is an assertion of fact. The remaining allegations, "in regard to the dwelling-house," and in regard to the "character of the land," are extremely vague, and do not show that the alleged untrue representations as to them were representations of fact. As the case must be reversed, we think it not improper to express our views as to those questions which may arise in another trial.

We think the true rule of damages in case of a verdict for plaintiff is the difference between the actual value of the Pooser place, and its value if the alleged facts regarding it had been true. The defendant is to make good his representations of fact as though he had given a warranty to that effect: 3 Sutherland on Damages, 589; *Benton v. Pratt*, 2 Wend. 385; 20 Am. Dec. 623. This rule makes the recovery exactly commensurate with the injury: 3 Sutherland on Damages, 590. The fact that the plaintiff took possession of the land, and had other transactions with the defendant without expressing dissatisfaction, does not estop him from bringing an action for deceit. When the vendee in a sale vitiated by fraud affirms the contract, he is not left without remedy, for he may still have recourse to an action on the case for deceit, and recover damages for whatever loss he may have sustained from being led into a disadvantageous purchase by willful misstatements of the vendor: *Harrington v. Stratton*, 22 Pick. 510; 1 Smith's Lead. Cas. 253.

The paper introduced in evidence above quoted as to the Pooser place, if the defendant had referred plaintiff to it as a correct description of the land, was properly admitted.

The gist of the action for deceit is, that the defendant made false representations, knowing them to be untrue. It naturally

follows that if the representations, though false, were believed to be true by the vendor, that he could not be held responsible in this form of action. The fact of knowledge of the defendant as to the truth or falsity of his representations is for the jury: *Manes v. Kenyon*, 18 Ga. 291; *Ormrod v. Huth*, 14 Mees. & W. 651.

The judgment is reversed, with leave to the plaintiff to amend his declaration.

VENDOR AND VENDER. — Evidence of fraud should be submitted to the jury, if from it the jury can properly find the question for the party on whom the burden of proof rests; but if not, it should be withdrawn from the jury: *Cover v. Manasaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Sinar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Knykendall v. McDonald*, 15 Mo. 416; 57 Am. Dec. 212; *Briscoe v. Bronnough*, 1 Tex. 326; 46 Am. Dec. 108; *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319; *Anderson v. Burneth*, 5 How. (Miss.) 165; 35 Am. Dec. 425; *McMichael v. McDermott*, 17 Pa. St. 353; 55 Am. Dec. 560; *Drinkard v. Ingram*, 21 Tex. 650; 73 Am. Dec. 250; *Burch v. Smith*, 15 Tex. 219; 65 Am. Dec. 154; *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282; *Davis v. Scott*, 22 Neb. 154; but see the following cases as to when fraud is question of law for the court: *Jessup v. Johnston*, 3 Jones, 335; 67 Am. Dec. 243; *Dodd v. McCraw*, 8 Ark. 83; 46 Am. Dec. 301; *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57.

FALSE REPRESENTATIONS WHICH WILL VITIATE OR AVOID A CONTRACT: See note to *Adams v. Schiffer*, 7 Am. St. Rep. 216; *Chatham F. Co. v. Moffat*, 147 Mass. 403; 9 Am. St. Rep. 727, and note 730; *Atwood v. Chapman*, 68 Me. 38; 28 Am. Rep. 5; *Frenzel v. Miller*, 37 Ind. 1; 10 Am. Rep. 62; *Griswold v. Sabin*, 51 N. H. 167; 12 Am. Rep. 76; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379, and note 382; *Marshall v. Buchanan*, 35 Cal. 264; 95 Am. Dec. 95; *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621; *Jenkins v. Long*, 19 Ind. 28; 81 Am. Dec. 374; *Campbell v. Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195; *Fulton v. Hood*, 34 Pa. St. 365; 75 Am. Dec. 664; *Jackson v. Stockbridge*, 29 Tex. 394; 94 Am. Dec. 290; *Alvarez v. Brannan*, 7 Cal. 503; 68 Am. Dec. 274; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *McCall v. Davis*, 56 Pa. St. 431; 94 Am. Dec. 92; *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230; *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717; *Jusan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Cartwright v. Carpenter*, 7 How. 328; 40 Am. Dec. 606; *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181; *Loddell v. Baker*, 1 Met. 193; 35 Am. Dec. 358; *Munroe v. Pritchett*, 16 Ala. 785; 50 Am. Dec. 203; *Snyder v. Findley*, 1 N. J. L. 78; 1 Am. Dec. 193; *Hast v. Matheny*, 1 A. K. Marsh. 192; 10 Am. Dec. 721; *Waters v. Mattingly*, 1 Bibb, 244; 4 Am. Dec. 631; *Culver v. Avery*, 7 Wend. 380; 22 Am. Dec. 586; *Shackelford v. Handley*, 1 A. K. Marsh. 496; 10 Am. Dec. 753; note to *Gant v. Hunsucker*, 55 Id. 411-415; note to *McArthur v. Johnson*, 93 Id. 596-598; *Aultman v. Yark*, 71 Tex. 261; *Griel v. Lomax*, 86 Ala. 132; *Craig v. Hamilton*, 118 Ind. 565; *Brackett v. Griswold*, 112 N. Y. 454; *Ramsey v. Wallace*, 100 N. C. 75.

FRAUD — FALSE REPRESENTATIONS WHICH WILL NOT VITIATE NOR AVOID A CONTRACT: *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166; *Grafenstein v. Epstein*, 23 Kan. 443; 33 Am. Rep. 171; *Mamlock v. Fairbanks*, 46 Wis. 415; 32 Am. Rep. 716; *Poland v. Brocnell*, 131 Mass. 138; 41 Am. Dec.

215; *Holbrook v. Connor*, 60 Me. 578; 11 Am. Rep. 212, and note 218; *Smith v. Mariner*, 5 Wis. 551; 68 Am. Dec. 73; *McGar v. Williams*, 26 Ala. 469; 62 Am. Dec. 739; *Fulton v. Hood*, 34 Pa. St. 365; 75 Am. Dec. 664; *Bell v. Byerson*, 11 Iowa, 233; 77 Am. Dec. 142; *Silver v. Frazier*, 3 Allen, 382; 81 Am. Dec. 662; *Miller v. Howell*, 1 Scam. 499; 32 Am. Dec. 36; *Tryon v. Whitmarsh*, 1 Met. 1; 35 Am. Dec. 339; *Anderson v. Burnett*, 5 How. (Miss.) 165; 35 Am. Dec. 425.

FALSE REPRESENTATIONS — PLEADING: See note to *Huston v. Williams*, 25 Am. Dec. 93, 96. False representations as to the condition, situation, and value of real estate, knowingly made by the vendor to the purchaser, are not actionable, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth; and in such case, the means by which he has been thus induced to forbear inquiry must be specifically set forth in the declaration: *Parker v. Moulton*, 14 Mass. 99; 19 Am. Rep. 315; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379. Fraud must be specially pleaded under code practice: *Clapp v. Cedar County*, 5 Iowa, 15; 68 Am. Dec. 678; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Keller v. Johnson*, 11 Ind. 337; 71 Am. Dec. 355; *Tift v. Harden*, 22 Ga. 623; 68 Am. Dec. 512; *Bartholomew v. Bentley*, 15 Ohio, 659; 45 Am. Dec. 596. A general allegation that a sealed instrument was obtained by fraud is not sufficient; the fraud must be set out: *Connor v. Dundee Chemical Works*, 50 N. J. L. 257. Whoever sets up fraud as a cause of action must do more than allege such fraud in general terms; he must set out the specific facts which constitute the alleged fraud: *Kerr v. Stenman*, 72 Iowa, 241.

VENDOR AND VENDEE — FRAUDULENT REPRESENTATIONS — MEASURE OF DAMAGES. — The measure of damages for fraudulent representations that vendor's title to slaves was absolute, when it was but a life estate, is the difference in the value of the two estates at the time of the sale: *Campbell v. Hillman*, 15 B. Mon. 506; 61 Am. Dec. 195. In an action by an administrator to recover the value of personalty obtained by the defendant under a fraudulent contract with plaintiff's insane intestate, the measure of recovery is the loss actually sustained, namely, the value of the property less the consideration paid and retained: *Johnson v. Culver*, 116 Ind. 278.

GRIFFIN v. FRIES.

[28 FLORIDA, 173.]

PLEADING AND PRACTICE — CROSS-BILL. — Where in a suit in equity defendant files a cross-bill praying affirmative relief, such cross-bill depends on the original suit, and can only be sustained on matters growing out of and germane to it, and such bill must seek equitable relief.

PLEADING AND PRACTICE — CROSS-BILL. — Where in an ejectment suit the plaintiff files a bill to enjoin defendant from cutting and removing timber from the land in dispute, and defendant, answering, denies plaintiff's title, and alleges title in himself, he may, at the same time, file a cross-bill to enjoin plaintiff from prosecuting the ejectment suit, provided equitable relief is sought by the cross-bill, and the facts justify such relief.

EJECTMENT — LOST DEED — CROSS-BILL. — Where in ejectment defendant files his cross-bill praying that plaintiff be enjoined from further prose-

cutting his ejectment suit, on the simple allegation that a deed which is a link in his chain of title is lost, and not asking for the re-establishment of such deed, the bill is without equity and demurrable.

EQUITABLE JURISDICTION TO RESTORE UNRECORDED LOST DEED. — While a court of law can afford relief in case of an unrecorded lost deed, by permitting the party claiming under it to prove its contents in a suit then pending before it, still law cannot afford adequate relief from dangers that may arise from subsequent purchasers and judgment creditors without actual notice, while equity alone is capable of affording present relief and establishing safe-guards against future exigencies; and, having entertained jurisdiction for this purpose, it will, in suitable cases, retain it, and make a final adjudication between the parties.

Fleming and Daniel, for the appellant.

Doggett and Buckman, for the appellee.

The CHIEF JUSTICE. The appellee, Alexander P. Fries, brought a suit in ejectment against the appellant, George B. Griffin, for the possession of a tract of land in the county of Duval. While said suit was pending, Fries filed a bill against Griffin to restrain him from cutting and removing timber from said land. He alleged in his bill that he was the owner of the land by operation of divers tax titles from the state of Florida, and by a deed from William Alsop, the lawful owner of the same. The defendant, Griffin, filed his answer, denying that Fries was the owner of the land, and claiming title thereto by deed from Isaac Roberts, who claimed title thereto by deed from William Alsop of a date anterior to the deed from said Alsop to Fries. Griffin at the time of filing his answer also filed a cross-bill, in which he alleges his purchase from and a conveyance to him by Roberts, and that Alsop had conveyed the land in controversy to Roberts a long time prior to the alleged conveyance by him to Fries; that said deed was lost without being recorded, but that Fries had notice of the same. The cross-bill was demurred to, the demurrer sustained, and the bill dismissed. The dismissing the cross-bill is the only error assigned. It is contended by counsel for appellee that the action of the chancellor was correct, because the cross-bill was not germane to the matters set up in the original bill. It is true that the cross-bill must be germane to the bill in the original suit, but it is clear that this principle is not applicable to the bill now being considered. It is between the same parties, and touching the same subject-matter in controversy. Fries relies on his ownership of the land to sustain his prayer for an injury to it. The cross-bill denies his ownership, and alleges that Griffin owns the land,

and in so far as that is concerned, it is matter of defense merely; but it goes further and alleges that a deed from a party from whom he derails title is lost,—that the existence of such deed was known to Fries,—and prays for affirmative relief against him. The title of Fries is the basis of his suit, and without which it cannot be sustained. Any matter set up in the cross-bill going to show that title was not in Fries, or that it was in Griffin, is in our opinion clearly germane. In the case of *German v. Machin*, 6 Paige, 288, the plaintiff filed a bill for partition of lands. The chancellor (Walworth) held that the defendant could set up as a defense that he was in equity entitled to the whole of the premises, and that in addition to this as a defense, if he wished for affirmative relief on his part by a transfer of the premises to him, that a cross-bill was his proper remedy.

The relief sought must be equitable relief. The remaining inquiry is, Do the facts set up in the cross-bill, if true, entitle the plaintiff therein to relief in equity? The bill alleges that a deed which was a link in the chain of title of Griffin was lost, and that there was no record of it made. It prays that Fries may be enjoined from further prosecuting his suit at law for the recovery of the land in controversy.

The loss of a deed is not always a cause for which a court of equity will grant relief. If this is the sole ground, a defendant in a court of law where a suit is pending between the parties, in which the land described in the lost deed is in controversy, can have full relief by showing by parol proof the contents of his lost deed: *Whitfield v. Faussett*, 1 Ves. 387. In the case of *Rogers v. Cross*, 3 Chanc. 34, the court say: "The loss or destruction of a deed may as well be established in a court of law as in a court of equity, and when such suit at law had been commenced, chancery will not interfere to suspend it." The bare allegation that a deed is lost is not sufficient ground to found a right to relief in equity: *Fonblanque's Equity*, b. 1, c. 3, note h. The bill must lay some ground beside the mere loss of a title deed to justify a prayer for relief, as that the loss obstructs the complainant's rights at law, or leaves him exposed to undue perils in the future assertion of such rights: *Story's Eq. Jur.*, sec. 84. A court of equity has the power to decree a re-establishment of deeds which have become accidentally lost or destroyed, on the ground that otherwise the complainant's title would be defective or embarrassed: *Cummins v. Coe*, 10 Cal. 529; *Hoddy*

v. *Hoard*, 2 Ind. 474; 54 Am. Dec. 456; *Pomeroy's Eq. Jur.*, sec. 1376, and note. In this case, there is no prayer for the re-establishment of the deed. When the bill alleges the former existence of a deed, its loss, with a prayer for its re-establishment, and the evidence is satisfactory to its existence, loss, and contents, a court of equity will decree in accordance with the prayer of the bill, and having jurisdiction on this ground, will retain the cause; and if all the circumstances and the prayer of the bill justify it, will make a final decree settling the respective rights of the parties, as in the case of *Christy v. Burch*, at the present term, in which the question of jurisdiction was conceded, or at least not raised. In that, Christy and wife had executed a deed to one Houston, which was lost, and the said Houston had conveyed to Burch. Christy having brought a suit for the recovery of the property, Burch filed his bill praying a re-establishment of the lost deed, and that Christy and wife be enjoined from prosecuting their suit against him. The court having all the parties in interest before it, and the question as to the existence, loss, and contents of the deed having been decided against the Christys, and there being no other question involved in the controversy between them, this court deemed it right to make a final decree establishing the lost deed, and enjoining the Christys from prosecuting a suit which was against good conscience.

But this case differs from that in this, that there is no prayer to re-establish the lost deed which was necessary to give this court jurisdiction. On the bare allegation of the loss of a deed, it prays for an injunction to enjoin the plaintiff from prosecuting his suit at law, and, lastly, it appears from the record that the deed from Alsop was not the only ground on which he based his claim to a recovery in the ejectment suit. The record shows that he claims title, also, by virtue of certain tax titles. We would say further, that in our opinion, that where a deed is lost and not recorded, that while a court of law can afford relief by permitting the party claiming under it to prove its contents in a suit then pending before it, that it is inadequate to afford relief from future dangers that may arise from subsequent purchasers and judgment creditors without actual notice, and that a court of equity is alone capable of dealing with such a case, not alone by affording present relief, but by establishing safeguards against future exigencies, and, as we have said, that, having jurisdiction for

this purpose, it will in suitable cases retain the cause and make a final adjudication between the parties.

Decree affirmed.

Pleading. — **CROSS-BILLS** must be confined to the subject-matter of the bill: *May v. Armstrong*, 3 J. J. Marsh. 260; 20 Am. Dec. 137; *Tarleton v. Ficks*, 1 Gilm. 470; 41 Am. Dec. 193; *Dill v. Shahan*, 25 Ala. 694; 60 Am. Dec. 540; *Andrews v. Kebbee*, 12 Mich. 94; 83 Am. Dec. 766; *Hurd v. Case*, 32 Ill. 46; 83 Am. Dec. 249, and note.

LOST DEEDS. — The loss of an unregistered deed entitles the grantee to the aid of chancery to have it vest the legal title in him, or to have the deed set up and established, as in other cases of lost deeds: *Hord v. Baugh*, 7 Hamph. 576; 46 Am. Dec. 91, and note 92; *Hoddy v. Hoard*, 2 Ind. 474; 54 Am. Dec. 456, and note 457; *King v. Gilson*, 23 Ill. 348; 83 Am. Dec. 269.

EQUITY JURISDICTION — MULTIPLICITY OF SUITS. — The preventing the multiplicity of suits is a favorite object of the courts of equity; and in furtherance of this object they settle and adjust in a single suit rights and interests which, in courts of law, result in various issues incapable of trial in one action: *Fellows v. Fellows*, 4 Cow. 682; 15 Am. Dec. 412; compare *Morgan v. Morgan*, 3 Stew. 383; 21 Am. Dec. 638; *Hughlett v. Harris*, 1 Del. Ch. 349; 12 Am. Dec. 104; *Fitzhugh v. Custer*, 4 Tex. 391; 51 Am. Dec. 728; *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464; *Schley v. Dixon*, 24 Ga. 273; 71 Am. Dec. 121; *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69.

NORRIS v. SAVANNAH, FLORIDA, AND WESTERN RAILWAY COMPANY.

[28 FLORIDA, 182.]

LIABILITY OF CARRIER FOR LOSS OF FREIGHT BY UNAVOIDABLE DELAY. —

An extraordinary and unprecedented flood causing a delay in transportation and loss of perishable freight is such act of God as will excuse the carrier from liability for the loss, provided he has been guilty of no negligence nor departure from duty contributing to the occurrence of such loss.

LIABILITY OF CARRIER FOR FAILURE TO GIVE NOTICE OF DELAY IN DELIVERY OF FREIGHT. — Where the delivery of perishable freight is delayed by an unprecedented flood, constituting an act of God, a mere failure to notify the consignor or consignee of the detention is not, of itself, negligence rendering the carrier liable for the consequences of such delay, especially in the absence of proof that if notice had been given the loss would have been lessened, or to what extent.

C. P. and J. C. Cooper, for the appellant.

RANEY, J. The appellant, who was plaintiff in the circuit court, delivered to the appellee at Jacksonville, in this state, February 2, 1884, 301 boxes of oranges destined for Cincinnati, Ohio, and consigned to the Grange Supply Company.

The oranges did not reach Cincinnati till the fifteenth day of the month, on which day, or on that and the next day, they were delivered to the consignee, but in a condition of such decay that only about eighty boxes could be used or sold. The appellant sued the railroad company, and there was a trial by jury, resulting in a verdict and judgment for the latter.

The only question we shall consider is, whether the loss sustained by the appellant is attributable to the act of God.

The defendant company's section of the railroad route over which the oranges were transported extends from Jacksonville, Florida, to Jesup, in Georgia, where it connects with the road of the East Tennessee, Virginia, and Georgia Railroad Company, extending to Chattanooga, Tennessee, from which point the road operated by the Cincinnati, New Orleans, and Texas Pacific Railway Company completes the route to Cincinnati. The oranges reached Jesup between two and three o'clock, A. M., of February 3d, where they were delivered to the East Tennessee, Virginia, and Georgia Company at about three o'clock, and they left there the same morning about seven o'clock by passenger train for Chattanooga, where they were received on the fifth of the month by the Cincinnati, New Orleans, and Texas Pacific Railway Company. They reached Ludlow, a station on the latter road one mile south from Cincinnati, and 335 miles north from Chattanooga, on the next day, but the precise time of the day cannot, the record states, be given because of the loss or destruction of the railroad company's records. They did not reach Cincinnati, however, until the fifteenth day of the month. They were shipped at Jacksonville in a through-car for Cincinnati, which car was billed as such, and "sealed with Jacksonville seals," and in this car they remained till taken from it for delivery to the consignees in Cincinnati, it not having been opened until about the time of such delivery. The route the oranges were transported over was the most direct railway route between Jacksonville and Cincinnati, and the time usually taken in transporting a through-car over it is "four or five days," or "about five days," and from Chattanooga to Cincinnati the time is from twenty-two to twenty-four hours. There was no unusual delay, but the car came through on time until it reached Ludlow, where it remained from the 6th to the 15th of February.

This detention at Ludlow was occasioned by a flood in the

Ohio River which obstructed entrance into Cincinnati, and early in the morning of February 6th washed out and destroyed a large portion of the Cincinnati end of the railroad bridge over the river, or the trestle at such end, it being under from eight to twenty feet of water, and prevented any repair of it until the twenty-fourth day of the month, when business was resumed over the bridge. This break could not be repaired so that engines could pass over it till the 24th. The water rose to an unprecedented height, so high as to stop all transit of trains, it rising over seventy-four feet, and not subsiding till the 24th, so that the passage of trains could be resumed. Trains can be run if the water does not rise higher than fifty-three feet. The flood was the highest ever known, was very destructive to property, and completely obstructed all access to the city by rail from the south and from the north, except by one small narrow-gauge road. It submerged a large portion of the business part of the city, through which the railroads run, including the road of the Cincinnati, New Orleans, and Texas Pacific Company. The Ohio River has never risen so as to obstruct travel over the Cincinnati, New Orleans, and Texas Pacific Company's bridge, except two or three times; once, it may be, in 1882, once in 1883, and in the instance stated in 1884, the rise in each succeeding year being higher than before. The bridge is iron and of good quality, and the roadway over it is 110 feet above low-water mark. The water rose between the 5th and 15th "to seventy-four feet and some inches." The river is subject to the same variations as any other river, and is rising and falling at all seasons of the year, but not such rises as those of 1882, 1883, and 1884. The bridge has not been changed, and a similar rise in the river would occasion the same detention on the road and all other roads to Cincinnati. One witness says it was absolutely impossible to deliver the oranges across the river from Ludlow by boats; that men could not have been hired for three hundred dollars, or any sum, to undertake the risk of carrying freight across in boats; that it would have been very dangerous, on account of the high water and swift current, and that there was no landing on the Ludlow side for boats. The car was taken from Ludlow as soon as it was possible to do so, and it was the first car of freight taken over the bridge from Ludlow and delivered to any point in Cincinnati. The Chicago, New Orleans, and Texas Pacific Railway Company, to render delivery of freight

possible, built a platform at the approach to the bridge, where the trestle was washed away, by February 5th, which, according to the testimony, was the earliest possible moment at which it could have been completed, and had the car brought over the bridge to this platform at once. At this time the car could not have been taken by the regular line of road into the city of Cincinnati, as there was from ten to twenty feet of water over the two miles of track necessary to be traversed. The railroad company hired boats to deliver the oranges on dry land to the consignees, who had wagons ready to receive them. These boats, through means of which the delivery was effected, were rough scows or barges which were filled with the oranges and poled through the streets near to high ground on Richmond Street, and there the oranges were delivered to teams which were drawn out into the waters to receive them.

The testimony shows that some other oranges were delivered in the city soon after the 6th of February, but that they were brought over the bridge before the 5th and anterior to the wash-out, and the delay in their delivery was attributable to the confusion incident to the flood.

An extraordinary flood, such as that of 1884, described in the testimony, is the act of God, and injury caused to the appellant by it solely is not a ground of action against the common carrier. Where the happening of the injury has been contributed to by the carrier, or would not have resulted from the act of God but for the carrier's negligence or departure from the line of his duty, he is not protected. What is such a contribution to the injury, or such negligence or departure from duty by the carrier as will deprive him of the protection which the act of God would otherwise give him, is a point upon which there is a conflict of authority. From the evidence in this case, we can see no negligence or departure from duty by the appellee contributing to the occurrence of the injury. There was no delay in transporting the oranges till they reached Ludlow, where they were detained by the flood, and it is clear that they were delivered to the consignees at their place of destination just as soon as the subsidence of the waters would permit an active diligence to deliver. The only grounds upon which negligence appears to have been alleged in the circuit court, or is charged here, are: 1. That as there had been risings of the Ohio River before the one pleaded, it was "the duty of the railroad company to have used reasonable diligence and care in protecting the goods from

decay by providing against such emergencies, either by constructing its road to meet the same, or by providing other means of transportation across said river," to avoid the detention; 2. That it was the duty of the company to have notified the plaintiff or the consignee of the detention of the oranges at Ludlow on their arrival there, and having failed to do so, it is not released by the flood from liability. We do not think the rises of the Ohio in 1882 and 1883 deprive the rise of 1884 of its character as an act of God, or required the appellee to have reconstructed its road, or provided other means of transportation across the river to meet such emergency. The testimony shows that up to the time the witnesses in the case testified, these rises were wholly unprecedented.

The mere omission to give the notice indicated by the second charge of negligence does not render the appellee liable. Whether or not a storing of the freight and notification thereof to the owner will relieve a common carrier from his liability as such, pending the interruption, according to what is said *arguendo* by Judge Dixon in *Conkey v. M. & St. P. R'y Co.*, 31 Wis. 637, 11 Am. Rep. 630 (but is not a point decided in that case), we are not called upon to say. We have seen no authority to the effect that in case of a delay caused by the act of God, a simple failure to notify the consignor or consignee of the detention is, of itself, an act of negligence rendering the carrier liable for the consequences of such delay. There is no contention that the oranges were not properly taken care of pending the interruption: *Bennett v. Bryan & Co.*, 38 Miss. 17; 75 Am. Dec. 90; Hutchinson on Carriers, sec. 268. Nor does the testimony show even that had such notice been given, the damage sustained by the plaintiff would have been lessened, or to what extent. What the plaintiff might have done, or what the result of his action upon the quantity of the damage would have been, cannot be assumed, even if it can be held that in such a case the damage sustained is attributable to the mere failure to give notice.

Upon the law and evidence in this case, the injury, in our opinion, is attributable to the act of God, and the judgment should be affirmed: *Bud v. Spaulding*, 30 N. Y. 630; *Railroad Co. v. Reeves*, 10 Wall. 176; *Mastin v. B. & O. R. R.*, 14 W. Va. 180; 35 Am. Rep. 748; *Williams v. Grant*, 1 Conn. 487; 7 Am. Dec. 235; *Hall & Co. v. Renfro*, 3 Met. (Ky.) 50; 2 Redfield on Railways, 6; *Friend v. Woods*, 6 Gratt. 189; 52 Am. Dec. 119. Judgment affirmed.

CARRIER'S LIABILITY FOR LOSS OR DETERIORATION OF GOODS BY DELAY.

— As this subject has been extensively treated in a note to *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561-567, what is here written will be supplementary thereto, and should be read in connection therewith. In the first place, then, it may be stated that where the carrier has made an express contract to carry and deliver within a specified time, he is bound to fulfill his contract. Nothing will excuse him, and he is liable for any delay, no matter from what cause it may have arisen: *Harmony v. Bingham*, 1 Duer, 209; *Collier v. Swinney*, 16 Mo. 484; *Tirrell v. Gage*, 4 Allen, 245; *Place v. Union Express Co.*, 2 Hilt. 19; *The Harriman*, 9 Wall. 161; *Texas etc. R'y Co. v. Nicholson*, 61 Tex. 491; *Wood v. Chicago etc. R'y Co.*, 68 Iowa, 491; 56 Am. Rep. 861. While, in the absence of an express contract, no rule of law exists specifying the time within which delivery must be made, still the authorities generally agree that there is an implied promise to carry and deliver within a reasonable time; and that what is such reasonable time must necessarily depend upon the peculiar circumstances of each particular case. Where, however, the carrier has failed to deliver the goods within a reasonable time, and there is no proof of due diligence on his part, he is liable in damages for the delay: *Nettles v. S. O. R. Co.*, 7 Rich. 190; 62 Am. Dec. 409; *Dawson v. Chicago etc. R. R. Co.*, 79 Mo. 296; *East Tennessee etc. R. R. Co. v. Nelson*, 1 Cold. 272; *Nudd v. Wells*, 11 Wis. 407. In *Vicksburg etc. R. R. Co. v. Ragsdale*, 46 Miss. 458-476, it is said that "when property is delivered to a carrier the law implies a contract that it shall safely and within a reasonable time be carried to and delivered at the place of destination. Nothing relieves from the obligation to deliver, except the act of God, the public enemy, the act or conduct of the owner, or special agreement limiting the common-law duty. Though no time is named, the implication arises from the receipt of the property for transportation that it shall be done with due dispatch, or within a reasonable time. The law does not attempt to fix by rule what is a reasonable time. Each case is referred to its own peculiar circumstances, an account being taken of the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary means for transportation under the control of the carrier. Temporary interruptions, or obstructions which could not with ordinary prudence be provided against, excuse delay, but do not absolve from the duty to carry and deliver as soon as it becomes practicable." And in *McGraw v. B. & O. R. R. Co.*, 18 W. Va. 361-367, 41 Am. Rep. 693, the preceding case was cited and the above language used, the court adding that "it is obvious that ordinarily the delay in shipping articles not liable to decay or damage, such as iron, wool, cotton, grain, and things of like character not liable to be injured by a few days' delay, would be no test in a case where the delay of a day in transportation would result in loss or damage by reason of their nature and inherent character, such as live-stock, fish, oysters, fruit, vegetables, and things of like character. In the one case there is nothing in the thing itself which would induce a prudent business man to anticipate injury from a temporary delay in transportation, whereas, in the other case, any prudent business man, from the nature of the thing itself, might reasonably anticipate loss or damage from delay. So the season of the year is an element to be considered, some articles, as some kinds of vegetables, being of that nature that at certain seasons of the year a brief delay would be harmless, whereas at another season of the year the delay would result in loss or damage." In one state (North Carolina) the statute fixes five days as the reasonable time in which goods must be shipped after being received; and in the absence of an express contract to the con-

tary, there is an implied agreement that they will be forwarded within the time mentioned in the statute, and if they are not, the carrier is responsible in damages for the delay: *McGowan v. Wilmington etc. R. R. Co.*, 95 N. C. 417.

As the law does not define what is an unreasonable delay in the shipment of goods, and as each case must be determined by the jury upon its own peculiar facts, it remains to illustrate the subject by the consideration of those cases in which the delay has been of such nature as, under the facts, to be considered reasonable, and to excuse the carrier from liability, or to have been unreasonable, and to make him responsible in damages for the delay. It must always be kept in mind that, in the absence of express contract, the act of God or the public enemy excuses delay, and that all that can be required of the carrier is that he exercise due care and diligence to guard against delay, and to forward the goods to their destination. He may, therefore, excuse delay by showing accident or misfortune, not inevitable, but the result of the conduct of man, or the propensities and characteristics of the property carried, such as live-stock: *Gelsamer v. Lake Shore etc. R'y Co.*, 102 N. Y. 563; 55 Am. Rep. 837; *Kinnick v. Chicago etc. R'y Co.*, 69 Iowa, 665; *Parsons v. Hardy*, 14 Wend. 215; 28 Am. Dec. 521. It seems, however, that the carrier must always be able to satisfactorily explain the delay. A delay of seventy days is unreasonable, unless explained, and renders the carrier liable in damages: *St. Louis etc. R'y Co. v. Heath*, 41 Ark. 476. And the same rule has been held as to a delay of fifteen days in the delivery of a box of merchandise: *Michigan etc. R. R. v. Day*, 20 Ill. 375; 71 Am. Dec. 278. Where the carrier accepts perishable property, such as potatoes, to be shipped over its line at a season of year when, in the course of nature, severely cold weather is to be apprehended, though the weather may be warm when the freight is received, the carrier is bound to use great diligence in forwarding such property with haste and dispatch, and where, by a delay of two or three days, either in transporting or delivering it, it is damaged by freezing, he is liable for such damage: *McGraw v. B. & O. R. R. Co.*, 18 W. Va. 361; 41 Am. Rep. 696; *Wood v. Chicago etc. R'y Co.*, 68 Iowa, 491; 56 Am. Rep. 861; *Hewitt v. Chicago etc. R'y Co.*, 63 Iowa, 611. So the carrier is liable for damages incurred from loss to hogs during transportation caused by delay, whereby the hogs "piled up," and a portion of them were suffocated, in the absence of proof that the highest degree of care was exercised during the delay for the preservation and safety of the animals: *Kinnick v. Chicago etc. R'y Co.*, 69 Iowa, 665; or that the delay was inevitable, or absolutely necessary: *Ball v. Wabash etc. R'y Co.*, 83 Mo. 574.

A delay of twenty-four hours at a way-station is an unnecessary delay in the transportation of live-stock, unless such delay is excused and explained: *Ormsby v. U. P. R'y Co.*, 2 McCrary, 48. Thus where cattle were placed in the cars provided for them by the carrier for their transportation, with his full knowledge, in time for the next regular cattle-train, he is bound to carry them by that train, and is liable for injury resulting through delay in not so shipping them: *Illinois etc. R. R. Co. v. Waters*, 41 Ill. 73. Where the carrier has entered into a contract with the shipper to transport and deliver goods within a certain number of days, or else pay a specified penalty for each day consumed in transportation over and above the number of days stipulated, he is liable, not only for the penalty, but also for the value of the goods, where they are perishable and are lost through decay arising from the delay: *Place v. Union Express Co.*, 2 Hilt. 19; *Nudd v. Wells*, 11 Wis. 407. So where a carrier has received perishable freight, which is unavoidably de-

tained by fog for two days, during which the carrier takes no care of nor employs any means to prevent injury to the freight, he is liable in damages: *Peck v. Weeks*, 34 Conn. 145. So where cabbages are side-tracked during transportation, and they thereby become frozen and worthless, the carrier is liable: *Tierney v. N. Y. Central etc. R. R. Co.*, 76 N. Y. 305. In this case it was determined that where the carrier receives perishable property for transportation, it is his duty to transport it by the first train, in preference to other freight; and if he has not the means of transportation at hand, it is his duty to refuse to receive it. Where a carrier has contracted to carry freight over its own or over that and a connecting line, an extraordinary influx of freight causing a blockade and delay will not excuse the carrier, especially where he has given no notice of the fact to the shipper: *Petersen v. Case*, 21 Fed. Rep. 885; *Maclaren v. Detroit etc. R. R. Co.*, 23 Wis. 138; *Condict v. Grand Trunk R'y Co.*, 54 N. Y. 500; *Chicago etc. R. R. Co. v. Dawson*, 79 Mo. 296; *Helliwell v. Grand Trunk R'y Co.*, 10 Biss. 170; *Great Western R'y Co. v. Burns*, 60 Ill. 284. In *Petersen v. Case*, *supra*, it was held that where, while the goods were in course of transportation, the connecting line notified the first carrier that he could not transport the goods owing to a block in freight, this did not relieve the first carrier for the delay, where he failed to notify the shipper, so that he might sell or dispose of or preserve the property. If at the time the goods were received there was already an over-accumulation of freight on his lines incapacitating them, or which might reasonably be expected to incapacitate them and cause unreasonable delay, and if this was known, or might have been known by reasonable effort on the part of the carrier, he is liable for the delay: *Helliwell v. Grand Trunk R'y*, *supra*. The other cases cited *supra* sustain these rules. As to notice, though there is a conflict in the authorities, the better rule is, perhaps, that if at the time the goods are received the carrier knows, or by reasonable diligence should know, that they will not be delivered without delay, because of a blockade of freight on his own or on connecting lines, or from other cause within his knowledge, and he fails to notify the shipper, he will be responsible in damages for loss arising from unreasonable delay in transportation from such cause: *Great Western R'y Co. v. Burns*, 60 Ill. 284; *Petersen v. Case*, 21 Fed. Rep. 885; *Helliwell v. Grand Trunk R'y*, 10 Biss. 171; *Conkey v. R'y Co.*, 31 Wis. 637. This last case would seem to conflict with *Peet v. Chicago etc. R. R. Co.*, 20 Wis. 624, where it is held that there is no rule of law requiring notice to the shipper in such case.

Act of God. — The authorities agree that when the delay is directly and proximately caused by an act of God, the carrier is exonerated from liability, in the absence of proof of negligence on his part. Thus it has uniformly been held that an unexpected freshet or inundation which occasions delay and causes loss is within this exception, and will excuse him when he is not guilty of negligence. He is not required to foresee and provide against extraordinary floods, but in case of delay from this or other causes directly the act of God, he is bound to exercise only that degree of prudence and care as to the transportation of the goods which would be expected of a careful business man under the circumstances. Amongst those cases which hold that a flood will excuse the carrier's delay, no matter whether the goods or freight being transported was perishable or not, may be cited *American Express Co. v. Smith*, 33 Ohio St. 511; 31 Am. Rep. 561; *Nashville etc. R. R. Co. v. David*, 6 Heisk. 261; 19 Am. Rep. 594; *Nashville etc. R. R. Co. v. King*, 6 Heisk. 271; *Nashville etc. R. R. Co. v. Jackson*, 6 Id. 271; *Railroad Co. v. Reeves*, 10 Wall. 176; *Wallace v. Clayton*, 42 Ga. 443; *Read v. Spaulding*, 30

N. Y. 630; 86 Am. Dec. 426; *Lippford v. Charlotte etc. R. R. Co.*, 7 Rich. 409; *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695; *Denny v. Railroad Co.*, 13 Gray, 481; 74 Am. Dec. 645; *Vicksburg etc. R. R. Co. v. Ragsdale*, 46 Miss. 458. So it has been held that where the carrier was delayed by deep snow making the road temporarily impassable, this was within the exception, and excused him from liability: *Ballentine v. North Missouri R. R. Co.*, 40 Mo. 491; 93 Am. Dec. 315; or the freezing of a canal or river upon which the carrier is transporting the goods: *Beckwith v. Frisbie*, 42 Vt. 559; *Parsons v. Hardie*, 14 Wend. 215; 28 Am. Dec. 521; *Bowman v. Teall*, 23 Wend. 305; 35 Am. Dec. 562; *Empire etc. Co. v. Wallace*, 68 Pa. St. 302; 8 Am. Rep. 178. The same has been held as to a low stage of water in a navigable river rendering it impossible for the carrier to deliver the goods: *Bennett v. Byram*, 38 Miss. 17; 75 Am. Dec. 90; *Silver v. Hale*, 2 Mo. App. 557. As the general rule is, that the carrier is liable only for the proximate, and not for the remote, consequences of his negligence, it has been questioned whether, when the loss or injury occurs by an act of God following the carrier's delay, the carrier should be held liable upon the ground that but for the delay the loss would not have happened; or, in other words, the question is, if the carrier delays the freight for an unreasonable time, but for which he would have been able to deliver the goods safely, or to deliver them to the connecting carrier by whom they would have been carried beyond danger from an act of God causing the loss, is the carrier liable for the consequences of such delay?

Upon this question the courts differ. In *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695, goods were injured by flood. The canal-boat by which the goods were being carried was drawn by a lame horse, and the result was that the boat did not make its usual speed. If it had, it would have reached and passed the point where the goods were injured before the flood; and it was held that the carrier was liable only for the proximate, and not for the remote, consequences of his negligence; that the flood, and not the delay, was the proximate cause of loss, and for that reason the loss fell within the exception of an act of God excusing the carrier. Again, in *Denny v. New York etc. R. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645, goods had been unnecessarily delayed in transportation, and after they were carried had been deposited in the carrier's warehouse, and while awaiting delivery to a connecting carrier, were injured by flood, which injury would not have occurred but for the unnecessary delay. It was urged that the delay was the direct cause of the damage, but the court held that the flood, which was an act of God, was the direct cause of the loss; that the delay was only the remote cause, and that the carrier was not liable. This ruling was approved in *Hoadley v. Northern etc. Co.*, 115 Mass. 304, 15 Am. Rep. 106, where the injury was caused by an unavoidable fire following an unnecessary delay. These cases were expressly cited and followed by the supreme court of the United States in *Railroad Co. v. Reeves*, 10 Wall. 176, where the loss occurred by flood following a delay. They were also followed and approved in *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264, where after the carriage had commenced it was voluntarily suspended and delayed by the carrier, but the freight during the delay was not exposed to any of the perils peculiar to the transit. When the transportation was resumed, a storm arose, and the freight was destroyed, and the court held that the carrier, from the mere fact of the delay, was not liable, though the freight otherwise would probably have been safely delivered; that the storm was the proximate, and the delay the remote, cause of the loss. So in *Michigan etc. R. R. Co. v. Bur-*

rows, 33 Mich. 6, the same doctrine is maintained. In that case, a car-load of apples was frozen while delayed by an injury to the track by the great Chicago fire, causing a great accumulation of freight, and an urgent necessity for the immediate shipment of relief goods, and the court held the delay excusable; that it was not the natural and proximate cause of the loss. In another case it was said that where an unreasonable delay is charged against a carrier, and loss of market claimed, he cannot recover upon proof of other delay not chargeable to defendant, but that he must trace some damage to the delay of the defendant: *Detroit etc. R'y Co. v. McKenzie*, 43 Mich. 609. In *MacVeagh v. Atchison etc. R. R. Co.*, 18 Am. & Eng. R. R. Cas. 651, through an unnecessary delay by the carrier goods were attached. It was held that the attachment, like an act of God, excused the delay, and that the carrier's negligence was the remote, and not the proximate, cause of the injury. The reasoning of these cases is accepted in *McGrass v. Baltimore etc. R. R. Co.*, 18 W. Va. 360; 41 Am. Rep. 696; and in *Hewitt v. Chicago etc. R. R. Co.*, 63 Iowa, 611.

On the other hand, the doctrines stated above and some of the cases cited have met with disapproval and criticism at the hands of other courts. Thus in *Michaels v. N. Y. etc. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415, where a carrier received goods for immediate transportation, but unnecessarily delayed them, in consequence of which they were injured by flood, it was held that he was liable for the loss by reason of the delay, though the flood might have been the immediate and proximate cause of the injury. This ruling was expressly approved in *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, an action growing out of damages to goods by the same flood during transit. These cases have been followed in *Dunson v. N. Y. etc. R. R. Co.*, 3 Lans. 264; *Bostwick v. Baltimore etc. R. R. Co.*, 45 N. Y. 712; *Condit v. Grand Trunk R'y Co.*, 54 Id. 500. In the latter case, the court, after citing the foregoing New York cases, and disapproving *Denny v. N. Y. etc. R. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645, and *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695, said: "These decisions are in direct conflict with the law as settled in this state, and cannot control the decision in this case. The defendant's delay was unreasonable. It was attributable to defendant's fault, and it exposed the goods to the fire by which they were consumed. Hence its fault contributed to the loss, and it thus became liable." A similar ruling to this last was made in *Michigan etc. R. R. Co. v. Curtis*, 80 Ill. 324, where fruit-trees were destroyed by frost and fire before arriving at their destination, and after an unreasonable delay. So in *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406, where wine froze after an unnecessary delay, the carrier was held liable; and the court said that the better opinion was, that the act of God which excuses the carrier must not only be the proximate but also the sole cause of the loss; that when the act of God caused the loss, if the negligent delay of the carrier mingled with it, or was an active or co-operative cause, he was still responsible. This ruling is approved and followed in *Read v. St. Louis etc. R. R. Co.*, 60 Mo. 199, *Pruitt v. Hannibal etc. R. R. Co.*, 62 Id. 527, where it is remarked that the later decisions incline to the opinion that where the negligence of the carrier concurs in and contributes to the injury, he is not exempt from liability on the ground that the immediate damage is occasioned by an act of God, or inevitable accident. This case is approved in *Davis v. Wabash etc. R. R. Co.*, 89 Id. 340. Again, in *Southern Express Co. v. Womack*, 1 Heisk. 256, goods were delivered during the Civil War for transportation, and owing to a blockade of freight the goods remained in the depot for some twenty days, when they were cap-

tured by soldiers and lost; and in an action against the carrier, it was held that though the goods were taken by the public enemy, the carrier was liable in consequence of the delay.

Strikes—Riots—Mobs.—The earlier cases maintain that a carrier is liable for the inevitable delay and consequent damage to goods in transit caused by strikes of employees, armed mobs, or rioters, and the like. These decisions are based on the ground that a mob or riot, no matter how great in numbers, cannot be considered as coming within the term "public enemy," so as to excuse delay by the carrier; while a strike of employees will not excuse the carrier, because those who intrust their goods to the carrier have no means of knowing or ascertaining the character or disposition of his employees or agents, no voice in their selection, nor control over their actions. This doctrine, as to a strike of railroad employees, was maintained in *Blackstock v. New York etc. R. R. Co.*, 20 N. Y. 48; and this case was followed with approval in *Read v. St. Louis etc. R. R. Co.*, 60 Mo. 199; and to the same effect is *Lewis v. Ludwick*, 6 Cold. 368; 98 Am. Dec. 454. On the other hand, the later cases on the subject establish an exactly contrary doctrine, and the previous ruling is disapproved and overruled in *Geisner v. Lake Shore etc. R'y Co.*, 102 N. Y. 563, 55 Am. Rep. 837, where it is said that "not only storms and floods, and other natural causes, may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the track or disable the rolling stock, or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination." In this case, live-stock were delivered to a carrier to be transported over his line of railroad. In an action to recover damages for a delay in the transportation, it was shown that they were carried with reasonable rapidity as far as a certain station on the road, where the train stopped for the purpose of making certain usual changes. The carrier was willing and anxious to proceed, and had the necessary employees and rolling stock to do so, and so attempted, but was prevented by a strike of employees, who not only refused to run the train or obey orders, but, by intimidation and violence, prevented other employees, who were ready and willing to proceed with the train, from doing so. The result was, that the train was delayed for eleven days, when the strike ended, and the stock were at once transported to their destination. The court held that the carrier was not liable for the delay caused by the striking employees, and it was said that when such men abandoned the carrier's employment, they ceased to be his servants or agents for whose acts he was responsible; that, conceding that the strike was organized while the men were in the carrier's employ, it was a matter outside their employment, and excused the carrier from liability; that the delay was not caused by the strike, but by the unlawful conduct of the strikers after they left the carrier's employment. And to the same effect are *Pittsburg etc. R. R. Co. v. Harra*, 84 Ill. 36; 25 Am. Rep. 422; *Pittsburg etc. R. R. Co. v. Hollowell*, 65 Ind. 188; 32 Am. Rep. 63; *Lake Shore etc. R'y Co. v. Bennett*, 89 Ind. 457.

In these cases, it is held that where the delay in carrying stock is caused, not by the negligence of the carrier, or his wrongful act, or that of his employees, but solely by the riotous conduct of a lawless mob, which neither the carrier nor the civil authorities can resist nor control, he is not liable for damages resulting from such delay. Again, in *Indianapolis etc. R. R. Co. v. Justice*, 10 Brad. App. 295, where the delay was caused by the overpowering of the carrier's servants by a mob, which prevented the running of trains,

the court held that for a delay caused by a refusal of the carrier's servants to do their duty the company would be liable, but that for a delay caused by the lawless violence of men not in his employ, he is not responsible. And to the same effect is *Wertheimer v. Penn. R. R. Co.*, 17 Blatchf. 421, and *Sherman v. Penn. R. R. Co.*, 3 Am. & Eng. R. R. Cas. 274.

Measure of Damages. — Where the goods are intended for sale in the market at the destination to which they are being transported, and the carrier is guilty of unreasonable and negligent delay in their transportation, the authorities are now universally agreed that, in the absence of special circumstances making the rule inequitable, the proper measure of damages for the delay is the difference between the market value of the goods when they are delivered and the market value at the time they should have been delivered: *Deveraux v. Buckley*, 34 Ohio St. 16; 32 Am. Rep. 342; *Illinois etc. R. R. Co. v. Cobb*, 72 Ill. 148; *Rankin v. Pacific R. R.*, 55 Mo. 167; *Louisville etc. R. R. Co. v. Mason*, 11 Lea, 116; *St. Louis etc. R'y v. Mudford*, 44 Ark. 439; *Ward v. New York etc. R. R. Co.*, 47 N. Y. 29; 7 Am. Rep. 405; *Sisson v. Cleveland etc. R. R. Co.*, 14 Mich. 489; 90 Am. Dec. 252; *Ward's Central etc. Co. v. Elkins*, 34 Mich. 439; *Kent v. Hudson River R. R. Co.*, 22 Barb. 278; *Peet v. Chicago etc. R'y Co.*, 20 Wis. 624; 91 Am. Dec. 446; *Ingledeid v. Northern R. R.*, 7 Gray, 86; *King v. Woodbridge*, 34 Vt. 565; *Cutting v. Grand Trunk R'y Co.*, 13 Allen, 381; *Whalon v. Aldrich*, 8 Minn. 346.

To these damages interest is sometimes added, computed from the time the delay occurred: *Newell v. Smith*, 49 Vt. 255. But the damages recoverable are only those which are actual and legitimate. The carrier is not liable for hypothetical damages, nor for any supposed loss therefrom: *Gerhard v. Neese*, 36 Tex. 635. Cases sometimes arise where the application of the above rule would be inequitable, as in some instances there are special reasons why the shipper may desire that the transit of his goods may be hastened, and if this is known to the carrier, and he unreasonably delays the transportation, or if having expressly agreed to carry them within a given time, or for a certain purpose, he negligently delays them beyond that time, the above rule will not recompense the shipper. In a case where the owner of the goods had made an advantageous sale of them if delivered within a specified time, and the carrier, knowing this, attempted to carry and deliver them within that time, and negligently failed to do so, whereby the shipper lost such sale, the carrier was held liable for whatever loss the owner had thereby sustained, and this loss was the difference between the contract price and the market value of the goods when delivered: *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455; 2 Am. Rep. 287. On the other hand, if the carrier is not informed of such special facts as those set out above, or similar ones, and undertakes to carry the goods without knowledge of them, he is only liable in damages as first stated: *Scott v. Boston etc. Co.*, 106 Mass. 468. It is held in *Vicksburg etc. R. R. Co. v. Raysdale*, 46 Miss. 458, and in *Priestly v. Northern etc. R. R. Co.*, 26 Ill. 205, 79 Am. Dec. 369, that where the delay is in the transportation of machinery to be applied to a special use, known to the carrier, he is liable for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means, the expenses of workmen, the loss or gain on work contracted to be done, if such work could have been done if the machinery had been delivered and the gain thereby definitely ascertained in proper time.

CHIPLEY v. ATKINSON.

[28 FLORIDA, 206.]

MASTER AND SERVANT—DAMAGES FOR PROCURING DISCHARGE OF SERVANT.—An employee may maintain an action for damages against a third party maliciously procuring his employer to discharge him from employment under a legal contract for a certain period pending such period, provided damages result to the employee from his discharge; and under the same circumstances the action may be maintained, though the employment is not for a fixed period.

MASTER AND SERVANT—DAMAGES FOR PROCURING DISCHARGE OF SERVANT.—Though no contract exists between the master and servant, and no legal right as between them is violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge.

MASTER AND SERVANT—DAMAGES FOR PROCURING DISCHARGE OF SERVANT.—An unsuccessful, but malicious, attempt to procure the discharge of an employee by a third person will not support an action against him for damages. To support such action, an actual discharge is necessary.

MASTER AND SERVANT.—Where, in an action by a servant to recover damages against a third person for maliciously procuring his discharge, the declaration alleges that there was a contract for his employment for a long period of time, it is erroneous to charge that plaintiff can recover, though there was no contract for a definite term of service.

MASTER AND SERVANT—DAMAGES FOR MALICIOUS DISCHARGE.—In an action by a servant against a third person for maliciously procuring his discharge, the absence from the agreement of employment of a clause fixing the wages at a certain or stipulated amount will not defeat a recovery of damages, so long as the value of such compensation can be ascertained.

MASTER AND SERVANT—DAMAGES FOR PROCURING DISCHARGE OF SERVANT.—In an action for damages against a third person for procuring the discharge of a servant, if it appears that the latter left the service voluntarily, owing to the unsuccessful, but malicious, attempts of such third party to have him discharged, he cannot recover. An actual discharge is necessary to a recovery.

MASTER AND SERVANT—DAMAGES FOR PROCURING DISCHARGE OF SERVANT.—In an action by an employee against a third person for maliciously procuring his discharge, the speculative profits or probable damage resulting to the employee from a proposed partnership with the employer is entirely too uncertain to be estimated as an element of actual or compensatory damages sustained by the employee. Where, however, the third party knew or believed, or had reason to believe, that the employer had promised or did actually intend to admit the employee into partnership, the fact of such knowledge or belief may be considered by the jury in passing upon the motive of the third party, and in fixing exemplary damages.

MASTER AND SERVANT—DAMAGES FOR PROCURING DISCHARGE OF SERVANT.—In an action by an employee against a third person for maliciously procuring his discharge, the fact that such third person withheld a gratuity from or broke his contract with the employer, because the latter retains the employee in his service or with an interest

in his business, does not give the employee a right of action. There is no privity nor any legal right violated between the third person and the employee; nor is such withholding or breach of contract proof of procurement of discharge, but may be used as proof to show the malicious attempt of the third person to persuade the employer to discharge the employee.

THE plaintiff, Atkinson, sued Chipley, alleging that he, Atkinson, was in the employ of the partnership firm of Kehoe and Walker, manufacturers of brick, as general superintendent, under agreement by which his employment was to be continued for a long period of time, with promise and prospect of an interest in such business; that defendant, contriving and intending to injure him, maliciously procured and caused such partnership to discharge him from their service, and by reason thereof he suffered loss and damage to the amount of five thousand dollars. There was also a count alleging slander, and claiming damages to the amount of five thousand dollars. Plaintiff recovered \$740 damages, and defendant appeals.

W. A. Blount, for the appellant.

Liddon and Carter, and J. C. Avery, for the appellee.

RANEY, J. 1. In *Bowen v. Hall*, L. R. 6 Q. B. D. 333, decided in 1881, the English court of appeal held that an action lies for maliciously procuring a breach of contract to give exclusive personal service for a time certain, provided damage accrues, and that to sustain such an action, it is not necessary that the employer and employee should stand in the strict relation of master and servant. The person induced to break his contract had agreed to manufacture glazed brick and baths, and not to engage himself to any one else for a term of five years. This decision is founded upon one of the chains of reasoning in *Lumley v. Gye*, decided by the queen's bench in 1853 (2 El. & B. 2, 16), though it repudiates the other. The chain of reasoning adopted is set forth in *Bowen v. Hall*, *supra*, substantially as follows: Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie; that if these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by

a third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him; that though it has been said the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own willful act, and therefore is not the natural or probable result of the defendant's act, and though this may be so in many cases, yet if the law were so to imply in every case, it would be an implication contrary to manifest truth and fact; that though it has been said that if the act of the third person is a breach of duty or contract, or is a act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act; yet if this were so held in all cases, the law would, in some instances, refuse to recognize what manifestly is true in fact; . . . that merely to persuade a person to break his contract may not be wrongful in law or fact, still, if the persuasion be used for the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, it is a malicious act which in law and in fact is a wrongful act, and therefore an actionable act, if injury issues from it; . . . that it cannot be maintained that the breach of contract is not a natural and probable consequence of the act of persuading the third person to break his contract; the breach is not only the natural and probable consequence, but, by the terms of the proposition which involves the success of the persuasion, it is the actual consequence; that unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendant that the injury is, in such a case, in law as well as in fact, a natural and probable consequence of the cause, and there is no technical rule against the truth being recognized.

In *Lumley v. Gye*, *supra*, a count in the declaration was for maliciously procuring an actress to break her contract (which was executory) to sing at plaintiff's theater, and nowhere else, and it was held by a majority of the court that an action would lie for the malicious procurement of a breach of contract, though not for personal services, if by the procurement damage was intended to result, and did result, to the plaintiff. See *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780.

The chain of reasoning set forth in *Bowen v. Hall*, *supra*, would support an action in behalf of an employee against a third party maliciously procuring his employer to discharge

him from employment under a legal contract for a certain period pending such period. The principle applied is as applicable in behalf of an employee as in behalf of an employer so injured through the malicious interference of the third person. Whether, however, the same principles are applicable when the terms of contract or service are such that the employer may terminate them at his pleasure, without violating any legal right of the employee, is a question of more intricacy. There is no question but that where such a right to terminate the employment does exist, the mere presence or absence of malice in the breast of the employer in doing so is immaterial, in so far as the employee having a right of action against him; for the simple exercise of a legal right is not dependent upon the nature of the motive with which it may be exercised. In *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, the decision is, that an employer has the right to refuse to employ or retain in his service any person renting certain specified premises, and the owner of such premises has no cause of action against him for the exercise of such right, though such refusal was through malice or ill-will to such owner; and in *Payne v. Western etc. R. R. Co.*, 13 Lea, 507, 49 Am. Rep. 666, the supreme court of Tennessee held that the mere posting of a notice by an employer to employees, maliciously forbidding them to trade with a certain person therein named, does not constitute slander or libel, and that it is not unlawful for a railroad company to discharge hands for trading with a certain merchant, unless thereby a contract between the company and employees is broken; even then no action lies to the merchant, unless the notice be libelous. Where one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice or other bad motive toward another does not give the latter a right of action against the former. Though there be a loss or damage resulting to the other from the act, and the doer was prompted to it solely by malice, yet if the act be legal and violate no legal right of the other person, there is no right of action: *Phelps v. Nowlin*, 72 N. Y. 39; 26 Am. Rep. 93; *Chatfield v. Wilson*, 28 Vt. 49; *South Royalton Bank v. Suffolk Bank*, 27 Id. 505; *Harwood v. Benton*, 32 Id. 724; *Bradley v. Fuller*, 118 Mass. 239; *Hunt v. Simonds*, 19 Mo. 583; *Jenkins v. Fowler*, 24 Pa. St. 308; *Wheatley v. Baugh*, 25 Id. 528; 64 Am. Dec. 721; *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 255; 68 Am. Dec. 770; 8 Rob. 51; 4 Id. 62; *Frazier v. Brown*, 12

Ohio St. 294; *Acton v. Blundell*, 12 Mees. & W. 324. In *Phelps v. Nowlin*, *supra*, there was on defendant's land a spring which was surrounded by an embankment, the effect of which was to raise the water in a well upon plaintiff's land. Defendant, not for his own benefit, but simply with intent to divert the water from plaintiff's well, dug a ditch through the embankment, thus restoring the water to its natural course, and having the effect to lower the water in the well, to the plaintiff's injury. It was held that the action, which was for damages and to restrain the diversion of the water, was not maintainable. Such cases, though we do not question their correctness, should, however, not be construed so as to justify any unauthorized invasion of another's rights.

In *Walker v. Cronin*, 107 Mass. 555, the count was, that plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that defendant, well knowing this, did, unlawfully, and without justifiable cause, molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will, and that thereby the plaintiff lost their services and the profits and advantages which he would have derived therefrom, and was put to great expense to procure other suitable workmen, and compelled to pay larger prices for work than he would have had to pay but for the said doings of the defendant, and otherwise injured in his business. It was objected *inter alia* that this count of the declaration did not show that the persons induced to leave plaintiff's employ did not have a right to do so, yet the count was held to show a cause of action, and the demurrer was overruled. In a note to section 487 of Schouler on Domestic Relations, it is said that for a master to maintain an action it is enough if the service is one at will, if subsisting when interrupted: *Salter v. Howard*, 43 Ga. 601; *Sykes v. Dixon*, 9 Ad. & E. 244. In *Rice v. Munley*, 66 N. Y. 82, 23 Am. Rep. 30, one S. had contracted, by parol, to sell and deliver to plaintiff a quantity of cheese, but being made to believe by the fraud of the defendant that plaintiffs did not want the cheese, sold it to defendant. The contract was not binding under the statute of frauds, but would have been performed by S. had it not been for the fraud. It was held that the action was maintainable against the defendant. In *Ben-*

ton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623, where Seagraves and Wilson had contracted with plaintiffs to purchase of him, to be delivered at a future time, twenty hogs, and nothing had been done to make the contract binding under the statute of frauds, and while plaintiff was preparing to perform his contract, the defendant, knowing the fact, fraudulently represented to Seagraves and Wilson that plaintiff did not intend to deliver his hogs, and this induced Seagraves and Wilson to buy their hogs, and then Seagraves and Wilson refused to take plaintiff's hogs, solely because they had a full supply, it was held that where a contract would have been fulfilled but for false and fraudulent representations of a third person an action for damages will lie against such person, although the contract could not have been enforced by action. "It is not material," says the opinion, "whether the contract of the plaintiff with Seagraves and Wilson was binding upon them or not; the evidence established beyond all question that they would have fulfilled it but for the fraudulent representation of the defendants": *Green v. Button*, 2 Crompt. M. & R. 707.

In *Walker v. Cronin*, *supra*, after quoting Comyn's Digest (notes on case A), as follows: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case, to be repaired in damages," it is said "the intentional causing of such loss to another without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong: *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; 11 East, 571, 574. . . . Thus every one has an equal right to employ workmen in his business or service, and if by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their service. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business. . . . It is generally held that no action will lie against one for acts done upon his own land, in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantage or cause loss to him without violating any legal right; what is the motive in such cases is immaterial (citing *Chatfield v. Wilson*, *Frazier v. Brown*, *supra*); but in *Wheatley v. Baugh*, *supra*, the suggestion . . . that malicious acts without the

justification of any right, that is, acts of a stranger resulting in like loss or damage, might be actionable," was approved. "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against skill and competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or annoyance comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it comes from the mere wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to"; i. e., Comyn's Digest, and others. See also, as bearing on the general question, *People v. Fisher*, 14 Wend. 1, 28 Am. Dec. 501, and *Rafael v. Verelst*, 2 W. Black. 1055, where it was held that trespass lay against defendant for procuring by awe, fear, and influence, and contrary to his own inclination, a sovereign, independent, absolute prince to imprison the plaintiff: *Old Dominion Steamship Co. v. McKinna*, 35 Alb. L. J. 208, and cases cited.

From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself not a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it. Such wanton and malicious interference for the mere purpose of injuring another is not the exercise of a legal right. Such other person who is in employment by which he is earning a living, or otherwise enjoying the fruits and advantages of his industry or enterprise or skill, has a right to pursue such employment undisturbed by mere malicious or wanton interference or annoyance. Every one has a perfect right to protect

or advance his business, if in doing so he infringes no superior legal right of another.

2. The defendant, appellant, excepted to the following paragraph of the judge's charge to the jury: "If the Pensacola and Atlantic Railroad Company had a contract with Kehoe and Walker to furnish a side-track to their brick-yard, and the defendant refused to perform that contract, intending thereby to injure the plaintiff by having him discharged, then the defendant would be liable to plaintiff for damages according to the law and evidence."

This instruction does not embody as an essential either the idea of an actual discharge of the plaintiff by Kehoe and Walker, or of such a discharge maliciously and wrongfully procured by defendant, or of any actual damage sustained therefrom by the plaintiff; but asserts that a refusal by Chipley to perform a contract of the railroad company with Kehoe and Walker, with the intent to have plaintiff discharged, is of itself a ground of recovery by plaintiff. Assuming that the instruction was not erroneous in other respects, the absence from it of the element of an actual discharge would alone be fatal to it. The mere intention to injure, however maliciously and wrongfully, does not create a right of action in the person for whom it is entertained. We think, moreover, that the charge should have been confined to the theory of the declaration, which is, maliciously and wrongfully procuring one to violate his contract with another, and thereby causing the latter injury.

3. The judge also charged the jury that "if the plaintiff entered into the employment of Kehoe and Walker upon the understanding that he was afterwards to be admitted into copartnership with them, he was an employee, and the defendant would be liable for procuring his discharge, even though there was no contract between plaintiff and Kehoe and Walker for a definite term of service or for stipulated wages." The defendant excepted. The case made by the declaration is, that the employment was under an agreement by which it was to be continued for a long period of time. An agreement between the plaintiff and Kehoe and Walker for the continuance of the employment for a long period of time cannot be ignored as a feature of the case. This allegation means that the agreement entered into by them entitled the plaintiff, either expressly or by implication, to employment, not only for a period of time, but for a long period. It means that a

period of time was agreed upon by them, and means that the period thus agreed on was, whether limited by months or years, or otherwise, to be proved. The language implies that there was at least some point of time in the future, ascertainable from the terms of the agreement, up to which the employment was to extend; that the continuation of the employment for any time was dependent upon the condition of a satisfactory performance of his duties by the plaintiff would not be inconsistent with an employment for a particular period. If there was no agreement for any particular period of time, but the employment was one in which the agreement was that plaintiff should be given employment as long as he performed his work satisfactorily, and he has been discharged from it solely through the malicious and wrongful procurement of the defendant, and injury has resulted, he should have laid his case accordingly; but such is not the averment here. The fact that the actual damage may not be ascertainable in such a case would not defeat a recovery of at least nominal damages. The meaning of the language used in the declaration is, that the terms of the agreement were such as to enable the court and jury to ascertain from them at least the minimum period for which the employment was to continue, and to show that this period was a long one. How can it be said that the period of time for which the employment was to continue was a long one, if the terms of the agreement did not indicate the length of it? In view of the case made by the declaration, we think the charge erroneous.

The absence from the agreement of a clause fixing the wages at a certain or stipulated amount would not defeat a recovery. If the compensation, wages, or benefit to be derived by the employee is such that its value can be ascertained, it is sufficient to sustain even compensatory damages.

4. The jury were also instructed "that if the plaintiff voluntarily left the service of Kehoe and Walker because of the conduct of the defendant in endeavoring to procure his discharge, it would be equivalent to a discharge, and the defendant would be liable to the plaintiff as for procuring the discharge; but if the plaintiff voluntarily left the service of Kehoe and Walker without reference to the conduct of the defendant, then the defendant would not be liable." The effect of this is, that if the plaintiff, knowing of the alleged conduct of Chipley, voluntarily left the service of Kehoe and Walker on account of such conduct, yet without being in fact

discharged by them, that such voluntary leaving their service constituted in law a discharge of him from their service by Kehoe and Walker. There must, we think, always be such a discharge of the plaintiff in a case like this as amounts to a termination by his employer of the contract to the employee. The doctrine of the charge is, that the ineffectual efforts of Chipley to induce or procure Kehoe and Walker to break their agreement with plaintiff is supplemented into a right of action by the plaintiff's terminating a relation or service which Kehoe and Walker had not terminated, notwithstanding Chipley's efforts. Chipley's efforts to procure Kehoe and Walker to break their contract with plaintiff, however malicious such efforts may have been, could not create a right of action of the character set up in the first count of the declaration, if unsuccessful. One cannot supply at his volition the deficiencies characterizing the conduct of another as a ground for either an action at law or suit in equity. My own termination of a contract, whether with or against the will of my employer, cannot constitute a breach of it by him, or create a ground of action against him or one who has unsuccessfully endeavored to induce him to break it. The discharge or dismissal by the employers in a cause like this must be clearly made out or the case will fail. The charge is erroneous.

5. The defendant's attorney requested that the following instructions should be given to the jury:—

"1. In order that the plaintiff may recover under the first count, he must prove that the defendant unlawfully procured Kehoe and Walker to discharge the plaintiff from an employment which existed by contract between plaintiff and Kehoe and Walker. If there was no contract, then, even though the defendant unlawfully procured plaintiff's discharge, he has suffered no legal injury. 2. Even if there was a contract, if such contract was terminable at the will of Kehoe and Walker, then the procurement by the defendant of the dissolution of such contract does not constitute a ground of action." They were refused.

In view of the declaration in this case, we think the first of the above instructions was proper. The declaration shows a contract employment as general superintendent of a brick-yard, under an agreement, the same to continue for a long period of time, and one by which he earned the support of himself and his family. The second instruction is, for reasons stated in a former part of this opinion, erroneous.

6. Defendant also requested the judge to charge the jury as follows: "In order that the plaintiff may recover any damages for the procurement by the defendant that Kehoe and Walker should not take plaintiff into copartnership, there must have existed at the time of such procurement a legal contract by which Kehoe and Walker were bound to enter into a copartnership. If you find that there was merely an understanding that upon certain contingencies Kehoe and Walker and plaintiff were to enter into a copartnership, a procurement by the defendant of a withdrawal by Kehoe and Walker from such understanding will not entitle the plaintiff to recover for any damages resulting therefrom."

In regard to this instruction we may, in view of the fact that the case has to go back for a new trial, as well say that any actual damage probable to result to the plaintiff from a loss of the promised partnership is entirely too uncertain to be estimated. The speculative profits of a new or proposed business, such as this, cannot be looked to as an element of actual or compensatory damage sustained by the plaintiff: *V. & M. R. R. Co. v. Ragsdale*, 46 Miss. 458. Where, however, a defendant in a case like this knew, or believed, or had reason to believe, that the employer had promised or did actually intend to admit plaintiff into partnership with him, the fact of such knowledge or belief of, or even reason to believe, such promise or intention may be considered by the jury in passing upon the motive of the defendant, and in fixing exemplary damages.

7. The following instruction was also requested by defendant and refused by the circuit judge: "So far as the plaintiff is concerned, it was lawful for the defendant, as vice-president and general manager of the Pensacola and Atlantic Railroad Company, to refuse to furnish a side-track gratuitously to Kehoe and Walker, if they retained plaintiff in their employ, or with an interest in their business, even though there was a contract by which the railroad company were to furnish such side-track gratuitously, and such refusal does not furnish any ground of action for the plaintiff, if you find that he was not party to the contract." If A, acting in his own behalf, or in that of his principal, simply withhold a gratuity from B because B retains C in his employ, or with an interest in his business, neither the employer nor the employee has any right of action; and in such case, where there is a contract between the first person and the employer to furnish the latter any certain thing, and the first person refuses to perform or break his

contract for the reason that the third person is employed by the second, the third person or employee has no right of action for such refusal or breach of contract; in neither case has any legal right of C been violated, nor has C any privity with the contract. His assumed reason for the withholding or breach is not, either alone or with such withholding or breach, a ground of legal action; nor is proof of a mere withholding or violation of the contract by A because of such retention of C of itself proof of his procurement or persuasion of B to make the discharge. We do not mean, however, to say that in an action such as that set up in the first count of this declaration it is not competent for the plaintiff to show that the withholding or breach was used by the defendant with the malicious purpose and as a means of procuring or persuading the employer to discharge the plaintiff, but we think it is competent to so show.

The instruction requested should, we think, have been given, as it does not imply any such purpose of procuring a discharge of the plaintiff.

The judgment is reversed and a new trial granted.

MASTER AND SERVANT. — An action lies by a master against one who entices or persuades his servants to leave his employment: *Daniel v. Swearingen*, 6 S. C. 297; 24 Am. Rep. 471; *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780; and the master may even recover exemplary damages against one who knowingly and willfully entices away his servant: *Bixby v. Dunkip*, 56 N. H. 456; 22 Am. Rep. 475, and note 485. See also *Huff v. Watkins*, 15 S. C. 82; 40 Am. Rep. 680; *St. Johnsbury etc. R. R. Co. v. Hunt*, 55 Vt. 570; 45 Am. Rep. 639.

PLAINTIFF COULD MAINTAIN ACTION against defendant for damages sustained, where S. agreed to sell and deliver to plaintiff certain goods, but defendant by false and fraudulent representations induced S. to sell and deliver the goods to him; and this is true, although the contract between plaintiff and S. was void under the statute of frauds, but would have been performed except for defendant's wrong-doing: *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30, and note. But no action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house, and thus prevents the renting of the same: *Heywood v. Tillson*, 75 Me. 225; 46 Am. Rep. 373. And so no action lies for malicious posting of a notice by an employer forbidding his employees to trade with the person therein designated: *Payne v. Western etc. R. R. Co.*, 13 Lea, 507; 49 Am. Rep. 666, and note; *Chesley v. King*, 74 Me. 164; 43 Am. Rep. 569. Compare *Carew v. Rutherford*, 106 Mass. 1.

RANDALL v. BOURGUARDEZ.

[28 FLORIDA, 264.]

MORTGAGES — FORECLOSURE — OUTSTANDING TITLE — BREACH OF COVENANT. — Where a mortgagor is in the undisturbed possession of the land under a deed of conveyance, with full covenants of warranty, and no eviction, actual or constructive, is shown, and no insolvency of, or fraud or misrepresentation upon the part of, the vendor is alleged, the mortgagor cannot set up an outstanding title, or the breach of covenants, as a defense to a bill to foreclose for the unpaid purchase-money. The mortgagor's remedy is at law on the broken covenant.

MORTGAGES — FORECLOSURE — DECREE AGAINST FEME COVERT, in an ordinary foreclosure suit, for the payment of any balance which may remain due after an application of the proceeds from the sale of the mortgaged land is a personal decree, and void.

Wall and Turman, for the appellants.

Sparkman and Sparkman, and H. C. Macfarlane, for the appellee.

RANEY, J. 1. The appellee filed a bill of foreclosure of mortgage in the circuit court of Hillsborough County, in May, 1886, against the appellants, Allen F. Randall, and his wife, Mary F. Randall, and Orlando Knapp and Clara A. Knapp, his wife. The mortgage, which was executed by appellants to appellee on July 28, 1885, was made to secure the balance of the purchase-money agreed to be paid for the land covered by the mortgage, such balance being evidenced by two promissory notes, signed by each of the appellants. The answer alleges that the land was, at the death of the appellee's late husband, Constant Bourguardez, he having died September 18, 1884, used and occupied by him as his homestead, and that he left children, who still survive him, and that the appellee, who claimed title to the land under a devise of the same to her by his last will and testament, had no title thereto, as a homestead was not a subject of devise under the constitution of 1868, which was in force at the time of his death, and that the title to the land is in the children, and the appellee had, at the time of the conveyance, no title thereto; that the conveyance from appellee to the appellants contains covenants warranting the title. Neither insolvency of, nor fraud upon the part of, the appellee is alleged.

It was held in *Coy v. Dwinie*, 14 Fla. 544, a case under the Code of Procedure which was adopted in 1870 and repealed in 1873, that when a mortgage for purchase-money is sought to be foreclosed, and the deed of the premises contained

covenants, the mortgagor may resist the foreclosure by a recoupment or offset of damages for a breach of covenants to the extent of the damages sustained for a failure or partial failure of title, or any other matters embraced in the covenants. The right of the mortgagor to make such defense, it is said in the opinion, "cannot be questioned." Being a code case, it is sufficient to assume the correctness of the decision under that system of court procedure.

We understand the rule of chancery to be, that where the mortgagor remains in undisturbed possession of the land which he holds under a deed of conveyance, with full covenants warranting the title, and no eviction, actual or constructive, is shown, and no insolvency of, nor fraud or misrepresentation upon the part of, the vendor is alleged, the mortgagor cannot set up such outstanding title, or the breach of the covenants, as a defense to the bill of foreclosure for the unpaid purchase-money for which the notes and mortgage were given, but that in all such cases, of which that now under consideration is one, the mortgagor is left to his remedy at law on the broken covenant: *Patten v. Taylor*, 7 How. 132; *Noonan v. Lee*, 2 Black, 500; *Peters v. Boman*, 98 U. S. 56; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Abbott v. Allen*, 2 Id. 519; 7 Am. Dec. 554; *Edwards v. Lodine*, 26 Johns. 109; *Simpson v. Hawkins*, 1 Dana, 303; *Hill v. Butler*, 6 Ohio St. 207; *Leggett v. McCarty*, 3 Edw. Ch. 124; *McLemore v. Mobson*, 20 Ala. 137; *Booth v. Ryan*, 31 Wis. 45; *Robards v. Cooper*, 16 Ark. 288; *Latham v. Morgan*, 1 Smedes & M. Ch. 611; *York v. Allen*, 30 N. Y. 104; *Smith v. Fiting*, 37 Mich. 148; *Hile v. Davison*, 20 N. J. Eq. 228; *Glenn v. Whipple*, 12 Id. 50; *Key v. Jennings*, 66 Mo. 356; *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79; *James v. McKernan*, 6 Johns. 543. In *Long v. Allen*, 2 Fla. 403, 50 Am. Dec. 281, it was held that a want or failure of title of land for which a promissory note had been given was not a defense to an action at law on the note.

The case of *Lowry v. Hurd*, 7 Minn. 356, which holds a different rule under the Civil Code of that state, recognizes the above as the chancery rule: See also *Walker v. Wilson*, 13 Wis. 525; *Johnson v. Gere*, 2 Johns. Ch. 546.

2. There is, however, one ground upon which the decree must be reversed. It adjudges that if the moneys arising from the sale of the mortgaged property shall be insufficient to pay the amount due the complainant, "the defendants, Allen F. Randall, Mary F. Randall, Orlando Knapp, and Clara A.

Knapp, who are personally liable for the payment of the debt secured by said mortgage, pay to the complainant the amount of such deficiency, and that the complainant have execution therefor." The bill of complaint is an ordinary bill of foreclosure, and prays, among other things, for an execution against the goods and chattels, lands and tenements, of the defendants for any deficiency. This decree for any balance which may remain due after an application of the proceeds from a sale of the lands is a personal decree against the *femes covert*, Mrs. Randall and Mrs. Knapp. A married woman cannot bind herself, either in law or equity, so as to authorize a personal judgment against her: *Dollner v. Snow*, 16 Fla. 86. It is doubtless the case that this part of the decree was a mere oversight upon the part of the chancellor and counsel. Yet it cannot be permitted to stand.

Is not a decree for any such balance premature, anyhow, until it has been ascertained, after the sale? Chancery Rule 89; *Scott v. Russ*, 21 Fla. 260.

The decree is reversed, and remanded for such further proceedings as may be desired and are in conformity to the principle and practice in equity in such cases.

MARRIED WOMEN. — Personal judgments against married women are erroneous: *Note to Caldwell v. Walters*, 55 Am. Dec. 599; but the legal effect of a judgment, under a statute, to bind lands of the defendant and subject them to sale, cannot be impeached collaterally by the averment that the defendant was a married woman; and a sale of lands under such a judgment is valid: *Calles v. Ellison*, 13 Ohio St. 446; 82 Am. Dec. 448.

COVENANT OF WARRANTY — DEFECTIVE TITLE. — A purchaser of land who is in undisturbed possession, and has received a conveyance of the same with warranty, cannot have relief in equity against payment of the purchase-money on the ground of a defect in the title: *Abbott v. Allen*, 2 Johns. Ch. 519; 7 Am. Dec. 554, and note 558; compare the case of *Long v. Allen*, 2 Fla. 403; 50 Am. Dec. 281.

McCLELLAN v. SOLOMON.

[23 FLORIDA, 437.]

ATTACHMENT. — THE UNDIVIDED INTEREST OF AN HEIR in land under administration is subject to attachment, as such attachment does not dispossess the administrator, nor interrupt the administration.

ESTATES OF DECEDENTS — EQUITABLE LIEN OF HEIRS. — Where an heir is administrator of the estate of his father, his co-heirs have no equitable lien on his interest for the payment of their respective shares, or his indebtedness to them arising from his fraudulent administration of the estate.

ATTACHMENT — FRAUDULENT CONVEYANCE. — An attachment may be levied on the undivided interest of a debtor in land held by a third party under a fraudulent conveyance from him; and the plaintiff, on obtaining judgment, may sell such interest, and his purchaser may raise the question of the fraudulent conveyance in an action of ejectment by him to recover his purchase from the party in possession.

JUDGMENT LIEN DATES as to property previously seized under attachment in the action from the time of the levy of the attachment, which is constructive notice from its date to subsequent purchasers from the attachment defendant; and it makes no difference that the property at the time of the levy was held by a third party under a fraudulent conveyance from such defendant.

JUDGMENT LIEN — PRIORITY. — Where creditors having no lien file a bill to set aside a fraudulent conveyance and obtain a decree, whereupon an undivided interest in the land thus conveyed is sold as the property of the fraudulent grantor, and afterwards the same interest is sold under judgment against such grantor, obtained after the first decree, but in which action an attachment had been levied prior to such decrees, the purchaser's title at the judgment sale relates back to the levy of the attachment, and takes precedence of the purchaser's title at the sale under the decree or that of purchasers from him.

FRAUDULENT CONVEYANCE — PROOF. — Where one of the parties in ejectment claims title under a judgment sale against a fraudulent grantor, and the other party claims title through a sale under decree against such grantor, the latter decree adjudging the conveyance fraudulent and subjecting the land to sale as the property of such grantor, the introduction in evidence by the latter party of the decree declaring the conveyance a fraud makes further proof of it unnecessary.

John W. Malone, for the appellant.

D. L. McKinnon, for the appellee.

RANEY, J. Action of ejectment by appellee against appellant. Plea of not guilty. The case was submitted to the court without a jury.

The facts in this case, which were agreed on by the parties, are substantially as follows: That appellee is in possession of the lands, the one-fifth interest in which is sued for, containing 240 acres, and that said land constituted a portion of the real estate left by Grissom C. Bird, who died intestate in Jackson County on the 11th of October, 1862. John S. Bird, a son of said Grissom C. Bird, and one of his heirs, was appointed his administrator, and qualified as such on the tenth day of August, 1864; that John S. Bird, on the 2d of December, 1867, upon petition filed in the county court of Jackson County, therein setting forth that a sale of the real estate of Grissom C. Bird, deceased, was necessary in order to pay the debts of said estate, and that said Grissom C. Bird left a considerable personal estate, but that all of it had been

consumed in paying the debts of said estate and the costs of administration, obtained an order from the county judge of said county for leave to sell the real estate of said Grissom C. Bird, deceased, including the lands above mentioned; that said John S. Bird, on the 6th of January, 1868, offered said real estate at public sale, and that it was bid off by D. C. Dawkins, and subsequently deeded by said Dawkins to Mary J. Bird, the wife of John S. Bird; that George W. Jones, on the 5th of January, 1882, instituted a suit in the circuit court of Jackson County against the said John S. Bird individually, and on the same day caused an attachment to issue in said suit, and on the next day said attachment was levied on the one-fifth individual interest of John S. Bird in said lands; that William C. Bird, Ellen M. Bradwell, Martha Reagan, and the administrator of Charles M. Compton, deceased, the said Mary, Ellen, Martha, and Charles being also heirs of Grissom C. Bird, instituted, on the 21st of July, 1882, a suit in chancery in the circuit court of Jackson County against the said John S. Bird as administrator of Grissom C. Bird, and Andrew Scott as administrator of Mary J. Bird, and charged in their bill that the sale of the lands to D. C. Dawkins and Mary J. Bird was fraudulent, that the personal property of Grissom C. Bird, deceased, was more than sufficient to pay all the just debts and liabilities at the time of his death, and that John S. Bird had, by various misrepresentations, endeavored to defraud his co-heirs out of their share of said estate; that the sale of said real estate was not necessary to pay the debts of said estate, and that John S. Bird, in consequence of his maladministration of the estate, was indebted thereto in the sum of \$4,077.76, and prayed that the sale of the lands to D. C. Dawkins and to Mary J. Bird be set aside as fraudulent and void; that on the 26th of January, 1883, the chancellor made an interlocutory decree in said cause, declaring the sale of said lands to Dawkins and Mary J. Bird fraudulent, and set the sale aside, and on the twenty-second day of March in the same year made a final decree adjudging and directing that said lands be sold by Frank Philips, master, and that said master pay over the proceeds of said sale equally to the heirs, except the share of John S. Bird, which should not be paid to him until he paid his indebtedness to said estate, and upon his failure to do so for thirty days, then his share to be equally divided among the other heirs; that said master, on the 7th of May, 1883, sold said lands in pursuance of said decree to William C. Bird for \$1,000, and divided the proceeds arising therefrom among the

heirs of Grissom C. Bird, except John S. Bird, who failed to pay his indebtedness to said estate, and on the 30th of May, 1883, the chancellor made a decree confirming the sale of said lands; that George W. Jones, on the 14th of November, 1883, obtained a judgment against said John S. Bird in his said suit for \$2,367.69, and on the 23d of November, 1883, caused an execution to be issued and levied upon the undivided interest of said John S. Bird in said land; that on April 7, 1884, said undivided interest was sold by the sheriff of said county by virtue of said execution, and was purchased at the sale thereof by the appellant for \$150, and a deed thereto was executed to the appellant, bearing date April 7, 1884, and recorded in the records of Jackson County on the 12th of December, 1885; that appellee, on the 16th of March, 1885, purchased the said lands of William C. Bird, and received from him a deed of same date, which was recorded on the 18th of May, 1885; that appellee had notice of the sale of the undivided one-fifth interest of John S. Bird in the lands under the execution of said George W. Jones at the time he purchased the lands from William C. Bird. The appellant received no deed from Andrew Scott as sheriff for said lands under his purchase at the execution sale thereof until after the purchase of the lands by appellee and the recording of the latter's deed; but appellee had notice of appellant's purchase. That George W. Jones was not a party to the suit of William C. Bird and others against John S. Bird and Andrew J. Scott, as administrators respectively of Grissom C. Bird and Mary J. Bird. The court found for the appellee. The appellant moved for a new trial on several grounds, which it is unnecessary to set forth at length. The court denied the motion, and appellant excepted. The errors assigned are: 1. The court erred in overruling the appellant's motion for a new trial; 2. The court erred in rendering a judgment in favor of appellee against appellant.

Regarding the question as involved, we can see no reason why such interest should not be levied on by attachment. It is true that the levy was subject to be defeated if it should be found necessary to resort to the land to pay the debts of the intestate, but the levy of the attachment on land does not dispossess the administrator: *McClellan's Digest*, sec. 18, p. 114; nor would it interrupt or interfere with the administration of an estate in any way. Upon authority, however, as well as principle, such an interest is attachable: *Proctor v. Newhall*, 17 Mass. 81; *Lessee of Douglass v. Massie*, 16 Ohio, 271; 47 Am. Dec. 375; *Freeman on Executions*, sec 183

Another question is, Can this lien so created be subordinated to the claim of the co-heirs of the defendant in attachment, who is also the administrator of the estate of their deceased father, arising to them from the fraudulent administration of the estate by such co-heir and administrator? This could be done only on the theory that where one of the heirs to an estate is the administrator thereof, his co-heirs have an equitable lien on his interest for the payment of their respective shares. We have been unable to find such a principle. He stands, it is true, in the relation of a trustee to his co-heirs, but no lien arises from this relation on his undivided interest in the estate for any liability or indebtedness to them which he may by mismanagement of his trust incur.

As William C. Bird and the other complainants in the chancery suit instituted for setting aside the fraudulent sale made by the administrator, John S. Bird, had no lien on John S. Bird's individual interest as an heir in the land, their decree setting aside the sale to Dawkins and the conveyance to John S. Bird's wife gave them no priority over any other creditor for satisfaction of their claim out of his interest in the land: Bump on Fraudulent Conveyances, 552; Freeman on Executions, sec. 434; *Day v. Washburne*, 25 How. 552; *Robinson v. Stewart*, 10 N. Y. 89; *Barton v. Bryant*, 2 Ind. 189; *McNaughtin v. Lamb*, 2 Id. 642. At the time this decree, as well as when the subsequent one in the same cause for the sale of the land and application of the proceeds of John S. Bird's interest to his indebtedness to the complainants therein was made, the attachment in Jones's action had been levied upon the land. It was competent for Jones to do this, and proceed to judgment and sell the land; and after a sale under such judgment for the purchaser at such sale to raise the question of fraud in the sale to Dawkins and conveyance to Mrs. Bird: Bump on Fraudulent Conveyances, 517, 518; Freeman on Judgments, sec. 350; *Chatauque Co. Bank v. Risley*, 19 N. Y. 369; 75 Am. Dec. 347; *Scott v. Purcell*, 7 Blackf. 66; 39 Am. Dec. 453. The interest was attachable: *Proctor v. Newhall*, 17 Mass. 81; *Lessee of Douglass v. Massie*, 16 Ohio, 271; 47 Am. Dec. 375; Freeman on Executions, sec. 183. Upon the assumption that the sale to Dawkins and his conveyance were fraudulent, the lien of Jones's judgment relates back to the date of the levy of the writ of attachment as against John S. Bird, Dawkins, and Mrs.

Bird, and any one claiming under them, or any of them, who is not a purchaser for value and without notice of the fraud. There is no such purchaser; for William C. Bird did not purchase from any grantee of John Bird, nor did he purchase without notice of the fraud, but he not only purchased the undivided one-fifth interest in controversy as the property of John S. Bird, but did so (as we must necessarily conclude from the above statement of the facts) with full knowledge of the fraud.

The appellee, Solomon, does not claim title under any fraudulent grantee of John S. Bird, but does claim title mediately under John S. Bird; and not only did he have, before purchasing, knowledge of the execution sale under Jones's judgment, which may have been sufficient to put him on actual notice of the fraud and the attachment, but the judgment, relating, as it does, back to the attachment, was to W. C. Bird; and these being constructive notice to both of them of the lien of the attachment (*Budd v. Long*, 13 Fla. 288), the appellee is bound by it, unless there is something in the law applicable to this particular class of cases which deprives the attachment or judgment of its effect as such notice. Any one purchasing under the decree of sale in the chancery cause was bound to take notice of its contents and effect; and from the statement of the case it is clear that the decree of sale recognized John S. Bird as having an interest in the land, and proposed to subject its proceeds to the payment of his debt to the complainants, if he did not otherwise satisfy such indebtedness. Any person who might purchase was bound to take notice of any prior legal lien on the land, or on the interest of any part owner thereof. It may be admitted that the decree of sale became a lien from its date, March 22, 1883, or, for the sake of argument, if desired, from January 26th of the same year, when the decree setting aside the administrator's sale and the conveyance to Mrs. Bird was made; no more can be claimed. The purchaser under this decree was bound to take notice of all prior liens against the interest in question; and assuming the fraud spoken of and ascertained by the decree of January 26th, the attachment by Jones was a legal lien upon the undivided interest of John S. Bird. As Jones recovered a judgment, the lien thereof relates back to the levy of the attachment, and appellant's title is consequently superior to the title of the appellee, which is founded on a decree subsequent in time and effect to the Jones attachment,

though prior in time to his judgment: Drake on Attachment, sec. 221; *Lambert v. Kipp*, 9 Fla. 60. Though not satisfied that prior to the recovery of a final judgment against the fraudulent grantor, an attachment is a basis for proceeding, even in equity, to set aside an alleged fraudulent conveyance of real estate, we still do not doubt that whenever there has been such final judgment ascertaining the indebtedness, the judgment lien relates back to the date of the levy, as against the judgment debtor and his fraudulent grantee, or as against any one purchasing the real estate as the property of the judgment debtor subsequent to the attachment, as was the case here; nor have we any doubt that the title of the purchaser at a sale under the judgment dates as against such parties from the date of the levy of the attachment: *McMinn v. Whelan*, 27 Cal. 300; *Bagley v. Ward*, 37 Id. 121; 99 Am. Dec. 256; *Wilson v. Forsyth*, 24 Barb. 105; *Dodge v. Griswold*, 8 N. H. 425; *Owen v. Dixon*, 17 Conn. 492; *Weil v. Lankins*, 3 Neb. 384; *Chataque County Bank v. Risley*, 19 N. Y. 369; 75 Am. Dec. 347.

Under the agreement as to the facts of this case, the appellee may be considered as having introduced the decree declaring the conveyance a fraud; no further proof of it was necessary: *Chataque County Bank v. Risley*, *supra*. Whether we regard the decree as one setting it aside as void as to creditors, or as a fraud upon the other heirs simply as heirs, it is a part of his title.

The judgment is reversed and a new trial granted.

RESPECTIVE RIGHTS OF ADMINISTRATOR AND HEIRS. — Land of an intestate descends to his heirs, and may be sold under execution against them, subject, however, to the rights of the administrator, in case such land may be needed for the payment of debts: *Douglass v. Massie*, 16 Ohio, 271; 47 Am. Dec. 375; *Hyde v. Barney*, 17 Vt. 280; 44 Am. Dec. 338. Title of an intestate descends directly to the heirs, subject to administration: *Ansley v. Baker*, 14 Tex. 607; 65 Am. Dec. 136; *Austin v. Bailey*, 37 Vt. 219; 86 Am. Dec. 703; *Smith v. McConnell*, 17 Ill. 135; 63 Am. Dec. 340; *Cobb v. Stewart*, 4 Met. (Ky.) 255; 83 Am. Dec. 465.

FRAUDULENT CONVEYANCES — ATTACHMENT. — An attachment may issue against property which has been conveyed with intent to defraud creditors in general, and attachment plaintiff in particular: *Reyburn v. Brackett*, 2 Kan. 227; 83 Am. Dec. 457.

JUDGMENT LIEN — PRIORITY OF LIENS. — The lien of an attachment is prior to a subsequent execution lien: *Thoms v. Southard*, 2 Dana, 475; 26 Am. Dec. 467. The lien of an attachment takes priority over an unrecorded deed, which priority is not lost because the grantee under such deed has conveyed the land to another, who has put his deed on record before the

levy of the attachment: *Roberts v. Bourne*, 23 Me. 165; 39 Am. Dec. 614; *Moorman v. Gibbs*, 75 Iowa, 537. Judgment lien in an attachment suit relates back to the date of the levy: *Note to Franklin Bank v. Bachelder*, 39 Am. Dec. 607. Where no judgment or attachment liens exist, a levy operates upon realty as it does upon personalty; that is, the execution first served has priority: *Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256, and note 270. Until a general assignment is perfected by registration of the assignee's deed, the assignor remains subject to attachment by his creditors on account of previous fraudulent dispositions thereof, without regard to the purpose of the assignment, and notwithstanding the creditors, at the time of suing out their attachments, have notice of the incomplete assignment. In such case, the attaching creditors acquire right of priority as to satisfaction: *Solinski v. Lincoln S. Bank*, 85 Tenn. 368. A creditor who attaches real estate after another creditor has attached it, but sells it on execution before the first attaching creditor sells it, either creditor being the purchaser in the sale on his own execution against the same debtor, will have the priority of title, as between the two creditors, if the first attaching creditor fails to record his deed for more than three months after his sale is made: *Hayford v. Rust*, 81 Me. 97.

SULLIVAN v. LEAR.

[23 FLORIDA, 468.]

EVIDENCE OF VALUE. — Where an article has no market value, its value may be shown by proof of such elements or facts affecting the question as may exist. Recourse may be had to the items of cost and its utility and use, and the opinion of witnesses properly informed on the subject may be given in respect to its value.

EVIDENCE OF VALUE OF FRANCHISE. — A franchise or bare right to do a thing has no market value, when considered with reference to itself alone, and exclusively of its utility. To determine its value, resort must be had to evidence of the practical uses to which it can be put, or the profit which by proper management can be made out of it.

EVIDENCE OF VALUE OF FRANCHISE. — Where a franchise is without value, and of such character as to render both an expenditure of money and the application of business judgment and skill in its management necessary to make it useful and profitable, its value must be determined by a consideration of it in connection with such possibilities.

EVIDENCE OF VALUE OF FRANCHISE — OPINION. — The opinion of a witness as to the value of a franchise to build a wharf, when based upon his own experience in building and operating such a wharf, or when based upon an assumption of profit to be derived from the operation of such a wharf, is admissible; nor is the evidence rendered inadmissible from the fact that the witness cannot state the value of such franchise when taken alone, and not considered in connection with the improvements of which it is capable, or the ability of the owner to make use of it.

EVIDENCE OF VALUE OF FRANCHISE. — The price charged by a city granting a franchise is not conclusive as to its value in an action involving that question between the grantee and his vendee.

EVIDENCE OF VALUE. — Where the subject-matter of sale has no market value, the latter is peculiarly for the jury to determine, and whatever

seems calculated to aid them in reaching a correct conclusion should be submitted for their consideration.

EVIDENCE OF CONSIDERATION. — Where a deed or assignment acknowledges the receipt of a valuable consideration, without specifying what it is, parol evidence is admissible to prove its character.

EVIDENCE OF CONSIDERATION. — Where a deed or assignment recites that it is given "for value received," such recital does not exclude parol evidence that the consideration for the conveyance was of an executory character, and consisted of a promise, and the jury may so determine under such proof.

ACTION for damages, in which Lear alleged that Sullivan's testator in his lifetime purchased from him his franchise for a wharf, and agreed to give him the loading of one third of all the vessels consigned to him (Sullivan); that the agreement had not been complied with; that such franchise is worth five thousand dollars, but has not been paid for; and that Sullivan and his representatives refuse to pay or comply with such agreement. Damages were laid at ten thousand dollars. Sullivan, answering, denied the alleged agreement, and alleged the payment of the entire consideration for the franchise. At the trial, one Wittich testified that he was a timber merchant, and owned a wharf; that he considered the franchise in dispute worth five thousand dollars, and as valuable as his own, which he valued at from two thousand five hundred dollars to forty thousand dollars; that he obtained his franchise for a rental of ten dollars per annum; that he fixed the value of the franchise in dispute from the fact that he had by an outlay of from eight thousand to ten thousand dollars made his franchise of the value of twenty-five thousand dollars, but that he could not fix the value of the franchise in dispute without reference to the improvement of which it was capable. One Menefee testified that he was a timber merchant, and considered the franchise in dispute worth five thousand dollars; that he fixed such value from the fact that a person who controlled ballast could, by building a wharf, derive that amount of profit from it, but that he could not fix its value without reference to the owner's ability to build the wharf and control the ballast. One Callaghan testified that he knew of the franchise in question, could not fix a value, but had owned a similar franchise, which he sold for one thousand dollars; that he obtained his franchise for an annual rental of ten dollars. A motion was made to strike out the evidence of this witness relating to the price received for his franchise. Motion refused. A motion was also made to strike out the

testimony of the other witnesses relating to the valuation of the franchise in dispute. This motion was also refused. One Hart testified that he went with Lear to the wharf in dispute to meet Sullivan; that when they met, the former said to the latter, "Here is the deed to that wharf"; and that Sullivan, accepting it, replied: "All right; I will give you the loading of one third of all my ships as long as my firm lasts." On cross-examination, the witness testified that he was not present when the deed from Lear to Sullivan was executed; that he did not know the contents of the instrument delivered by the former to the latter, but was informed by Lear that it was a deed to the franchise in dispute. The deed executed by Lear to Sullivan, "for value received of D. F. Sullivan," conveys and assigns to him, his heirs and assigns, all right, title, interest, and authority to the franchise in dispute, and granted to Lear, together with all other rights, privileges, and franchises connected therewith. There was verdict and judgment for plaintiff for two thousand dollars, and defendant appeals.

R. L. Campbell, for the appellant.

W. A. Blount, for the appellee.

RANEY, J. Where an article in question has a market value, such value is usually taken as the actual value of such article. The proof of value is generally by the judgment or opinion of witnesses: 2 Sutherland on Damages, 375. If the article has no market value, its value may be shown by proof of such elements or facts affecting the question as may exist. Recourse may be had to the items of cost and its utility and use. The opinions of witnesses properly informed on the subject may be given in respect to its value: *Id.* 378; *Lafayette B. & M. R. R. Co. v. Winslow*, 66 Ill. 219; *Wemple v. Stewart*, 22 Barb. 154; *Kirschman v. Lediard and Ree*, 61 Id. 573. A franchise cannot be said to have a market value, and when its value is necessary to be proven, a resort must be had to the nearest relative facts and circumstances from which such value may be fairly inferred.

The franchise or bare right to do a thing considered with reference to itself alone is of no value. It is only when it is considered relatively and in connection with its use that it can be said to be valuable. The wharf without the right to use it would be of no appreciable value. It is the combination of the two — the wharf and the franchise — that mutually impart to each other, when combined, an estimable value.

It is clear that Wittich's opinion of the value of the franchise sold by the plaintiff to Sullivan is based in some degree upon the success of his own wharf business. He has so managed this business as to derive a revenue from it equal to the amount which thirty thousand dollars put at interest at the ordinary rate would produce, and because he has done so, he thinks that the franchise sold by plaintiff to be worth five thousand dollars. The value of anything is to be gauged with reference to the practical uses to which it can be put, or the profit which, by proper management, can be made out of it. That the witness could not state what was the value of the charter in itself, and without reference to the improvements of which it was capable, does not affect the admissibility of his testimony, because no franchise is of any value when considered without reference to its utility, and where it is of such a character as to render both an expenditure of money and the application of business judgment and skill in its management necessary to make it useful and profitable, its value must be determined by a consideration of it in connection with such possibilities. As a purchaser, we must regard Sullivan as a person who would have the means of making the franchise useful, or as desiring to hold it with the expectation of selling to some one who did have such means, or to one who had similar expectations, or we must consider him as one whose interest it was (either to avoid competition or for other purpose) to hold the franchise unimproved; and in either event the same principles obtain in fixing the value. Whatever effect the poverty or other disabling circumstance of an owner of a franchise or other property may have upon him in fixing the price at which he may have sold, it has no effect upon the principles by which the value of anything sold, without fixing the price, is to be ascertained. Its value, whatever it may be, is to be ascertained in the same manner and upon the same principles, whatever may be the condition, circumstances, or purposes of the buyer. Wittich's testimony shows him to be a person having such acquaintance with the character of the property in question as to entitle him to give an opinion. It was proper for the defendant to develop on cross-examination the foundation of the opinion, but we see nothing in the development so made which calls for the exclusion of his testimony.

The testimony of Menefee was likewise admissible. His opinion is based upon the utility of the franchise, and his business is such as to make his opinion competent testimony.

Callaghan's testimony was admissible. The price for which one thing actually sells is certainly some evidence of the value of another thing of the same kind. It is a practical test of what persons dealing estimate things of the kind as worth; and when a thing has no market value, we think it may be proved upon very much the same principle that the price for which an article having a market value has been previously sold may be proved: 2 Sutherland on Damages, 375-378. It is a fact bearing upon the question, and, like the price for which the city granted a franchise, is a legitimate aid to the jury in arriving at a correct estimate of the thing's value. Neither sale is conclusive upon the jury, who are to form their opinion from all the testimony affecting the question of value; yet we may say that it seems not at all unreasonable that a city government desiring the improvement of its wharves and the consequent development of the public interest would naturally exact but a nominal consideration from persons proposing such improvement, whereas the grantee of such privilege would in selling expect full compensation for it as the basis of a profitable business.

In a case where the subject-matter of the sale has no market value, the question of value is peculiarly one for a jury, and whatever fact seems naturally calculated to aid them in reaching a correct conclusion should be submitted for their consideration.

The circuit judge charged the jury, in effect, that if they were satisfied, from the evidence, that Sullivan received from the plaintiff a transfer of the charter for or in consideration that the former should give to the latter the loading of one third of the vessels to be consigned to him, Sullivan, then they must find for the plaintiff, and assess his damages at such a sum as the evidence may show would have been the profit, if any, which would have accrued to the plaintiff by the loading of the vessels consigned to Sullivan in his lifetime; that if they were not satisfied that such a consideration for the transfer was agreed upon, but were satisfied, from the evidence, that Sullivan purchased from the plaintiff the charter, and never paid for the same, they should find for the plaintiff, and assess his damages at the price, if any, proved by the testimony to have been agreed upon as to be paid for the same, or if there was no price agreed upon, they should assess the damages at whatever sum the testimony shows to have been its value at the time of sale.

The judge also charged that where a party conveys property to another, and in the deed of conveyance acknowledges that he makes the conveyance for value received, such acknowledgment is evidence that he has received the value of said property, and must be taken as conclusive that he did receive such value, unless it is proved that such value was not actually received; and therefore, if, in the case at bar, the jury was satisfied, from the evidence, that the plaintiff executed a deed of conveyance of the wharf charter, and acknowledged in such deed that he had received the value of such charter, and were further satisfied that there was no evidence to prove, notwithstanding such acknowledgment in the deed, that such value was not received, they must find for the defendant.

There was no exception to the judge's charge. Hart's testimony sustains the inference of the jury that the consideration was at least not an executed consideration. Sullivan's promise, made under the circumstances related, is inconsistent with the theory that there was nothing more to be done by him in connection with the transaction represented by the deed, or the idea that the deed acknowledges solely an executed consideration. Where a deed acknowledges the receipt of a consideration without specifying what it is, parol evidence is, we think, admissible to prove its character, upon the principle that the deed is incomplete or does not show the entire transaction: Greenl. Ev., sec. 284 a. Evidence may be given of a consideration not mentioned in a deed, even where one is mentioned, if the former be not inconsistent with the latter: Id. 285. The only consideration of which we have any testimony of the character of is the promise of Sullivan. It was made when the deed was delivered, the time when considerations, whether executed or executory, are delivered, and there is nothing in the deed from Lear to Sullivan inconsistent with the proof of such consideration. Such a promise made under such circumstances is to be taken as a consideration for the deed rather than as a gratuitous declaration. No prudent business man would have made it as a mere gratuity under the circumstances, particularly in view of its value, if performed. The evidence sustains the verdict, and the motion for a new trial was properly overruled.

The judgment is affirmed.

PAROL TESTIMONY. — *As to Receipts.* — Since receipts showing a settlement are but *prima facie* evidence of such settlement, they may be contradicted by parol testimony: *Thompson v. Maxwell*, 74 Iowa, 415; and it may

be stated that receipts form an exception to the general rule excluding oral evidence to contradict, vary, or explain written instruments: *Stackpole v. Arnold*, 11 Mass. 27; 6 Am. Dec. 150; and compare also *Ensign v. Webster*, 1 Johns. Cas. 145; 1 Am. Dec. 106; *Bridge v. Gray*, 14 Pick. 55; 25 Am. Dec. 358; *Raymond v. Roberts*, 4 Aik. 204; 16 Am. Dec. 698; *Pribble v. Kent*, 10 Ind. 325; 71 Am. Dec. 327; *Henry v. Henry*, 11 Ind. 236; 71 Am. Dec. 357.

Respecting Judicial Proceedings. — Parol evidence is admissible to prove that at a certain trial plaintiff made a claim for interest, which, if it had been allowed, would have made plaintiff's demand exceed one hundred dollars, the amount requisite to confer upon the trial court jurisdiction in the cause; and the testimony of the trial judge is the best evidence of this fact in such a case: *Stone v. Hawkins*, 56 Conn. 111.

As to the Execution of a Written Instrument. — That a written instrument was in fact executed, when such fact comes into question incidentally or collaterally, may be proved by oral evidence, without producing the written paper itself, no attempt being made to prove the contents of the paper: *Roberts v. Burgess*, 85 Ala. 192.

Antecedent or Contemporaneous Agreements. — As a general rule, extrinsic evidence by way of parol testimony is not admissible, either to add to, subtract from, contradict, or in any way vary the terms of a written contract; all antecedent or contemporaneous negotiations or agreements are merged into the written agreement: *Stoddard v. Nelson*, 17 Or. 417. In an action to recover back money paid on a transfer and assignment of land interests, evidenced by a written instrument which merely states that the assignor transfers and assigns his "right, title, and interest to the land recently contracted for," and that the assignees assume all liabilities, parol testimony cannot be received as to a promise or agreement by the assignor antecedent to the execution of the written assignment, or contemporaneous therewith, to refund the money if the assignees failed to acquire a deed for the land: *Griel v. Lomax*, 86 Ala. 132. But collateral agreements, while inadmissible to vary a written contract, may be proved for the purpose of showing that the contract never had a legal existence: *Brewster v. Reel*, 74 Iowa, 506. And so parol testimony is admissible to show that a writing which is in form a complete contract was not to become binding until the performance of some condition precedent resting on parol; but this rule should be very cautiously applied: *Reynolds v. Robinson*, 110 N. Y. 654. And parol testimony is admissible to show that an assignment in writing of a bond and mortgage was intended only to secure the assignee from the payment of a debt then in suit, which might subsequently become a lien upon a tract of land purchased by the assignee from the assignor; such testimony being allowed to explain the intent of the contracting parties, not to vary, alter, or contradict the terms of their written agreement: *Fulwood v. Blanding*, 26 S. C. 312. And where the contract between the parties, as shown by their correspondence, does not specify the commissions or rate of compensation to be paid to the agent, oral evidence of an antecedent agreement as to that matter may be admitted; but this principle cannot be extended to the admission of oral evidence as to an agreement for the insertion of restrictions, or special stipulations in a deed outside of the written provisions customary in a warranty deed: *Sayre v. Wilson*, 86 Ala. 151.

Subsequent Agreements. — When a contract in writing is uncertain in its terms, parol testimony of a subsequent agreement by and between the same contracting parties, making such contract definite, certain, and plain, is admissible: *Katz v. Bedford*, 77 Cal. 319.

To Add to, Vary, Contradict, etc., Writings in General. — Parol testimony cannot add to an imperfect contract a material part in order to sustain it, or make it binding and valid; but it can apply a description in it to the subject of the contract: *Watson v. Baker*, 71 Tex. 739. In fact, it has been decided that parol or extrinsic proof is always admissible and competent to identify the subject-matter of a contract, if necessary; and this in no way violates the rule that oral proof is inadmissible to vary or contradict the terms of a written contract: *Bulkley v. Devine*, 127 Ill. 407; compare *Dos ex dem. Dorgan v. Weeks*, 86 Ala. 329. Parol testimony is also admissible to identify the parties to a suit: *Parson v. Thornton*, 86 Id. 308. And so when a specific number of articles of a certain kind and description are sold, parol testimony is admissible to identify the goods offered for delivery as being the identical articles which were sold: *Habenich v. Lissak*, 77 Cal. 139. In an action on a promissory note given in part payment for the standing timber on a tract of land described in the written contract of sale as "all the pine timber *twelve inches heart and up*," parol testimony is admissible to show the meaning of the italicized words: *McKennis v. Wimberly*, 86 Ala. 195. Finally, it may be said, however, there is too much tendency in courts to relax the well-settled rules of evidence in the matter of excluding parol testimony offered to contradict, vary, or add to the terms of written instruments: *Moffitt v. Maness*, 102 N. C. 457.

PALATKA AND INDIAN RIVER RAILROAD COMPANY v. STATE.

[22 FLORIDA, 546.]

MOTION FOR NEW TRIAL OR IN ARREST OF JUDGMENT cannot be made after the term of court at which the trial was had.

PLEADING AND PRACTICE — RULE OF COURT. — No agreement between parties or counsel as to the trial of a cause is of any effect before the court unless the evidence of it is in writing, and subscribed by the party against whom it is alleged or made, in open court, and noted by the judge in his minutes.

INDICTMENT FOR OBSTRUCTING PUBLIC HIGHWAY is sufficient when it describes it as "a common highway in Putnam County, in this state [Florida], made and laid out for the people of this state to go, return, and pass at their free pleasure and will, on foot, on horseback, and in vehicle." Such description is equivalent to an allegation under the statute that it is an "established highway."

OBSTRUCTION OF HIGHWAY — INDICTMENT. — The statutes of Florida prescribing the powers and duties of railroad and canal companies as to crossing highways do not affect the rules of pleading controlling indictments for obstructing highways further than to require that the act alleged and charged shall appear not to be authorized by such statutes.

INDICTMENT AGAINST RAILROAD COMPANY for obstructing a highway is sufficient, under the Florida statute, when it alleges a complete and absolute closing of such highway against travel.

OBSTRUCTION OF HIGHWAY. — A grant to a railroad company of the right to construct its road along, upon, or across, or to use, an existing high-

way, in the absence of express words to the contrary, is not to be construed as a power to destroy such highway.

OBSTRUCTION OF HIGHWAY. — A grant of power to a railroad company to make a new road or open a new way across an existing highway, in the absence of an express provision to the contrary, leaves the railroad company under obligation to leave every highway it crosses in a safe condition for the use of the public, and to cause as little injury as possible to the old highway.

OBSTRUCTION OF HIGHWAY. — A grant of power to a railroad company to construct its road, along, upon, or across, and use, a highway is not, in the absence of express grant to the contrary, a power to so construct the road as to block the highway, so that it cannot be used by the public while trains are not passing over it, or the company is not otherwise properly using the track.

OBSTRUCTION OF HIGHWAYS — RAILROADS. — Grant of power to a railroad company to carry a highway which may be touched, intersected, or crossed by the track over or under it, "as may be found most expedient for the public good," and to change the line of the highway where an embankment or cutting calls for it, or it is desirable with a view to a more easy ascent or descent, and to acquire additional land for the construction of such highway on a new line, shows a clear intent to preserve to the public a highway, either the old one on the old surface or on a new surface, or new highway; also that when the conditions of locality are such that both roads cross on the same surface, the highway may be passed over the railroad or under it, according to the public good; also that when the conditions are such as not to permit, consistently with its practical use, the grading of the highway to the railroad cut or embankment, to authorize a detour or change in the route of the highway, the latter, after being established upon land acquired by the company, to be maintained as other public highways, open to the public, and not as a private road of the company.

OBSTRUCTION OF HIGHWAY. — Where power is granted to a railroad company concerning crossings and intersections of highways, which includes power to alter the grade of the highway so as not to substantially impair its usefulness in case there is a cut or embankment, and the level of the highway is graded down or up to the surface of the track therein in such manner and at such angle as not to work any substantial detriment to persons or vehicles traveling the highway, the company does not transcend its powers; and where the topography of the country is such that the cut or embankment makes a change of line of the highway either necessary or desirable, to make a more easy ascent or descent, such change may be made; but where the road passes along instead of across the highway, it must be so constructed as not to destroy or obstruct the latter, or prevent its use by the public.

JUDGMENT OF CONVICTION OF NUISANCE must be adapted to the nature of the nuisance, and must not be inconsistent with the legal rights of the party convicted. The most accessible and consistent legal means of abatement of the nuisance must be adopted.

APPEAL from a conviction for maintaining a nuisance by obstructing a public highway by digging ditches, throwing up embankments, and placing cross-ties and iron rails thereon. Other facts are stated in the opinion.

Alfred Bishop Mason, for the plaintiff in error.

Charles M. Cooper, attorney-general, for the defendant in error.

RANEY, J. 1. This case is brought here by writ of error. There was no motion for a new trial, or in arrest of judgment, made until after the term. The motion so made was properly overruled. Such motions cannot be made after the term: *McClellan's Digest*, sec. 1, p. 453.

It is unnecessary to say more in regard to the disagreement of counsel over their conversation or alleged verbal understanding as to when the trial in the circuit court should take place than that no agreement between parties or counsel, as to a trial of a cause, is of any effect before the court, unless the evidence of it is in writing, and subscribed by the party (or his attorney) against whom it is alleged or is made, in open court, and noted by the judge in his minutes: *Cir. Ct. Com. Law Rule 43*.

2. There is no bill of exceptions, and the only assignments of error to be considered relate to the record proper.

It is urged that the indictment does not accuse the defendant of any crime.

The statute (*McClellan's Digest*, sec. 8, p. 428) provides that if any person or persons within this state shall obstruct any public road or established highway by fencing across or into the same, every such person or persons who shall build any such fence, or willfully cause any other obstruction in such road or highway, or any part thereof, shall be liable to be indicted, and on conviction thereof shall be fined in a sum not exceeding one hundred dollars, at the discretion of the court; and the judgment of the court shall be that the obstruction be removed.

The indictment is founded upon this statute.

It is urged that the indictment is insufficient in that it does not allege that the road is a "public road," or "an established highway." In indictments at common law the expression the king's or queen's "common highway, used for all the liege subjects, . . . with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labor," is used. We think the allegation of the indictment before us, that the road described was and is "a common highway in Putnam County, in this state, made and laid out for the people of this state to go, return, and pass at their free pleasure and will, on foot, on horseback, and in vehicles," is equivalent to either

that of the common-law form, or to an allegation under the statute that it was and is an "established highway." It is not necessary to use the exact language of the statute: words of equivalent import are sufficient.

We have considered the question whether the indictment shows an unlawful, as well as a willful, obstruction of the highway, and our conclusion is that it does, for its meaning is that the obstruction is such as to prevent the people from traveling the highway, or in other words, it shows a complete obstruction of the highway against travel. The statutes of this state prescribing the powers and duties of railroad and canal companies as to crossing highways do not affect the rules of pleading controlling indictments for obstructing a highway further than to require that the act alleged and charged to be such obstruction shall appear to be an act which is not authorized by such statutes. They do not authorize a simple and absolute closing of the highway against travel, as is alleged here. Our views on this subject will appear more fully in the discussion of the judgment in this case.

3. It is contended that the statute providing for establishment of public roads in this state is unconstitutional, because it forbids compensation for taking private property. Section 7, page 899, McClellan's Digest, which provides that nothing shall be allowed to any person whose "unimproved lands" a road may pass through, and section 2, page 898, which authorizes the supervisor of a road to use material adjacent to the road for building or repairing the same, are cited. In the absence of the bill of exceptions, we must assume that it was shown upon the trial that, as against the plaintiff in error, the road was lawfully established. The lands may have been "improved lands," and satisfactory compensation have been made under the statute, or by agreement, to the person owning them when the road was established. The question covered by the second section is not involved under the indictment.

4. The indictment shows that the Palatka and Indian River Railroad Company is a corporation existing under the laws of Florida. No judgment inconsistent with its rights as such should be permitted; and consequently, a consideration of the rights of a railroad corporation as to a road or highway is necessary in order to determine the correctness of the judgment before us, which judgment requires an actual removal of the railroad from the highway.

Our statute, by section 10, page 277, McClellan's Digest, empowers a railroad company to construct its road across, along, or upon, or to use, any street or highway which the route of its road shall intersect or touch, and provides that whenever the track of any railroad shall touch, intersect, or cross any road, highway, or street, such road, highway, or street may be carried over or under the railroad, "as may be found most expedient for the public good"; and that in case any embankment or cut in the construction of any railroad shall make it necessary to change the course of any highway or street, it shall be lawful for the railroad company to change the course or direction of the road, highway, or street. The twenty-second section, page 284, also provides that whenever the track of a railroad shall cross a highway, such highway may be crossed under or over the track, "as may be found most expedient"; and that "in cases where an embankment or cutting shall make a change in the line of such highway, or is desirable with a view to more easy ascent or descent," the railroad company "may take such additional lands for the construction of such road or highway on such new line as may be deemed requisite by the directors, unless the lands so taken for the purposes aforesaid shall be donated by the owner or owners." This statute also provides that the court shall declare "such road or highway, as located by the railroad . . . company, open for all purposes of a public road or highway without cost or expense to such railroad or canal company, and such lands so declared open shall be held for highway purposes."

A grant to a railroad company of the right to construct its road along, upon, or across, or to use, an existing highway, is not to be construed as a power to destroy the highway as such. This is the rule of construction, unless the language of the statute is such as to show unmistakably an intention to grant such power.

The law is well settled that when a new road or way is opened or made across a way or road already existing and in use, the new way must be so constructed as to cause as little injury as possible to the old way or road: *Northern C. R. R. Co. v. Mayor etc. of Baltimore*, 46 Md. 425.

"It is," says the supreme court of Illinois, "a well-settled principle of the common law, resting upon the most obvious considerations of justice, that any person or corporation that cuts through a highway for the benefit of such persons or cor-

poration must furnish to the public a proper crossing, even though acting under a license from the proper authorities. We refer, of course, to cases where the legislative power has not, in terms, relieved the person or company that interferes with a highway from the necessity of removing any obstructions they may create. In the absence of such an express provision, it is palpable that a railway company is under obligation to leave every highway it crosses in a safe condition for the use of the public": *People v. Chicago etc. R. R. Co.*, 67 Ill. 118; see also *Farley v. Chicago etc. R'y Co.*, 42 Iowa, 234; *Malby v. Chicago etc. R'y Co.*, 52 Mich. 108, 110; *Oliver v. N. E. R'y Co.*, 9 Q. B. 409; *Paducah etc. R'y Co. v. Commonwealth*, 80 Ky. 147, and 10 Am. & Eng. R. R. Cas. 318. Where the statute is silent, the common law applies; and a statute which expresses specifically no further exaction than a restoration of the highway to its former condition is not to be construed as abridging the common-law duty of maintaining the crossing in such plight as to make it reasonably safe: *Malby v. Chicago etc. R'y Co.*, 52 Mich. 108.

There is usually to be found in the statutes a requirement that the railroad companies shall restore the highway "to its former state," or put it in such condition and state of repair as not to "impair or interfere with its free and proper use," or as "not unnecessarily to have impaired its usefulness," or other equivalent provision.

In New York, where the last provision quoted obtains, it is stated in *People v. D. & C. R. R. Co.*, 58 N. Y. 165, to be "true that bringing in the word 'unnecessarily' does imply that the usefulness of the highway may have been somewhat impaired, either in the process of construction or in the maintenance of the railway, but that it was quite certain that the section does not mean that the highway should be rendered useless, but that it does mean that the highway shall be preserved for the use of the public travel, and to permit the adoption of it at the same time for the laying of its track upon it." Says Church, C. J., in *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 304: "The statute implies that the usefulness of a highway intersected may be to some extent impaired, and I think it fairly implies also that the crossing must be such as that the usefulness of the highway shall not be destroyed. The duty thus imposed is an important one for the public, and it should be imposed, not oppressively, but reasonably and fairly for the public benefit." See also *Tracy v. Troy etc. R'y Co.*, 38 N. Y. 433;

98 Am. Dec. 54. In *Railroad v. Commissioners*, 31 Ohio St. 338, when the provisions of the statute required the road to be placed in such condition as not to impair its former usefulness, the doctrine is that the legislature did not intend to require a restoration of the highway to its actual former condition, as that would be impracticable; that substantial restoration was all that was intended; that some inconveniences to the public travel are necessarily incident to all public railroad crossings, and such as are inseparably connected therewith must be submitted to by the public; that usefulness implied capabilities for use, and it never was intended to vest the company with the right to narrow the width of the highway, or materially interfere with its facilities for public travel, and much less to encumber it with abutments and embankments which effectually exclude the public from the use and enjoyment of the greater part of it. It is true, there is in our statute no such expression as any of those quoted above from other statutes, yet in view of the common-law rule and the provisions of the act as set forth above, we think it is perfectly clear that it never was intended that the railroad companies should have power to construct their roads across or along highways in such a manner as to destroy the usefulness of the highway to the public. The power to use an existing highway is, in the light of common reason, not a power to render it useless to those for whom it exists; or in other words, the power to construct a railroad along, upon, or across, and use, a highway is, without saying more, clearly not a power to so construct the railroad upon it that it cannot be used by the public while the railroad's trains are not passing over it, or otherwise properly using their track. If it had been the intention of the legislature to permit railroad companies, in the construction of their roads, to block up and permanently obstruct highways, the statute would have used words clearly expressive of such intent, so as to have relieved them from liability to indictment for willfully obstructing public roads and established highways. The provisions of our statute as to carrying a highway which may be touched, intersected, or crossed by a railroad over or under the railroad track, "as may be found most expedient for the public good," and as to making a change in the line of the highway where an embankment or cutting calls for it, or it is desirable with a view to a more easy ascent or descent, and the grant of authority to the railroad company to acquire additional land for the construction of such road or highway on such new line,

show a clear intent upon the part of the legislature to preserve to the public a highway, either the old one on the original surface or on a new surface, or a new highway.

The meaning of these provisions, in so far as they relate to the manner of the construction of the railroad (independent of any questions which may arise as to the use or operation of it), is nothing more than that when the conditions of locality or topography are such that the railroad and highway cannot cross or intersect on the same surface, the railroad company may pass the highway over the railroad or under, according as the former or latter shall be more for the public good; and furthermore, if it be that the conditions are such as not to permit, consistently with its practical use, the grading of the highway to the level of the railroad cut or embankment, to authorize a detour or change in the route of the highway. This new line or detour in the highway, after being established upon land to be acquired by the company, is to be maintained as other public highways, and to be open as a public highway, and not as a private road of the company. The power given by the statute to the company when its road intersects or crosses a highway includes the power to alter the grade of the highway, provided it is so done as not to substantially impair the usefulness of the highway. If there be a cut or embankment, and the level of the highway is graded down or up to the surface of the railroad track in such cut or on such embankment, and this is done in such a manner and at such an angle of descent or ascent as not to work any substantial detriment to either persons or vehicles traveling the highway, the company in so doing does not transcend its powers or duties. Where the topography of the country is such that the cut or embankment makes a change of the line of the highway either necessary or desirable, "with a view to a more easy ascent or descent," the change may be made. Where the railroad passes along instead of across the highway, it must be so constructed as not to destroy or obstruct the latter or prevent its use by the public; no greater power was intended.

If it had been intended that the railroad company should have the right to entirely obstruct and destroy existing highways, why were the above provisions enacted, whose only purposes were to authorize the railroad company either to pass the highway on a different surface or to make a new highway around the obstruction occasioned to the old one by the cut or an embankment? They show as distinctly as does the language

quoted from other statutes a clear intent to preserve the public highways against obstructions such as is alleged in this indictment.

Our understanding of this indictment, as indicated above, is, that this obstruction is one whose illegality is attributable to the manner of the construction of the railroad upon the highway, and not to the fact that the highway is crossed at a point outside of the authorized route of the railroad. It is only upon the former view that we think the indictment valid, for it does not state facts showing any illegality of the latter character: *Wabash and St. Louis R'y Co. v. People*, 12 Ill. App. 448.

As the judgment before us prevents the railroad company from abating the nuisance, or "removing the obstruction," by grading the highway to the surface of the railroad track, or by carrying the highway under or over the railroad, or by changing the line of the highway, or by carrying the railroad along and upon the highway on the surface of the latter, or in such other manner as not to obstruct it or prevent its use by the public, according as one or the other of these courses may, under the circumstances of the case, be proper, but simply orders an absolute removal by defendant of the constituent elements of the road-bed from the highway, we think the judgment erroneous in the above respect.

The form of a judgment in cases of nuisances is discussed in 3 American Criminal Law, 6th ed., sec. 2369, and notes; Wood on Nuisances, 2d ed., sec. 864; 2 Bishop's Criminal Procedure, secs. 870, 871, and authorities cited. Every judgment should be adapted to the nature of the nuisance of which a defendant may be convicted.

The judgment is reversed, and the cause will be remanded to the circuit court, with directions to enter a judgment in accordance with this opinion and the practice in such cases.

NEW TRIAL. — A new trial cannot be granted by a court except upon motion filed and considered at the same term at which judgment was rendered: *Goss v. McClaren*, 17 Tex. 107; 67 Am. Dec. 646. The motion for a new trial must be filed within the time required by the statutes of the state in which the case is tried; and the customary time for filing such motion is within three days after the verdict is returned, although judgment may not have been rendered upon the verdict: *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468. And so it was decided that where a party desiring a new trial sends his written motion by mail to the clerk of court, and such letter is not received by the clerk till one day after the expiration of the time for filing such motions, though it was in the post-office on the day previous, but not

called for by the clerk, such motion filed by the clerk on the day of its receipt was filed too late: *Mercer v. Ringer*, 40 Kan. 189. But the time for filing a motion for new trial may be extended by stipulation between the parties; but if filed after the time stipulated, it must be disregarded; *Robinson v. Benson*, 19 Nev. 331; compare *Sullivan v. Wallace*, 73 Cal. 308; *Pendergrass v. Cross*, 73 Id. 475; *Abbot v. Renaud*, 64 N. H. 39.

CORPORATION — NUISANCE — INDICTMENT. — When a corporation is indicted for a nuisance maintained by it, the indictment need only set forth the facts constituting the nuisance: *Delaware etc. C. Co. v. Commonwealth*, 60 Pa. St. 367; 100 Am. Dec. 570. In an indictment for obstructing a public road, a description of the road which calls it "Fayetteville and War Eagle road" is sufficient, as it is clear that the road referred to is the road leading from Fayetteville to War Eagle: *State v. Lemay*, 13 Ark. 406; *Patton v. State*, 50 Id. 53.

HIGHWAYS — RAILWAYS. — The right of a railway to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed; for any one unlawfully interfering with a highway creates a nuisance: *Evansville etc. R. R. Co. v. Orist*, 116 Ind. 446; 9 Am. St. Rep. 865, and note 875; *Little Miami R. R. Co. v. Commissioners*, 31 Ohio St. 338; *Callanan v. Gilman*, 107 N. Y. 360; 1 Am. St. Rep. 831, and note; *Turner v. Holtzman*, 54 Md. 148; 39 Am. Rep. 361.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

KNIGHT *v.* MORRISON.

[79 GEORGIA, 55.]

LEVY AND SALE ARE VOID WHEN MADE BY AN INTERESTED SHERIFF, as where he appears from the execution to be one of the persons beneficially interested in the judgment, to satisfy which the levy and sale are made. AFTER THE PAYMENT OF AN EXECUTION, it is *functus officio*, and a subsequent sale thereunder conveys no title.

J. S. Hook and R. O. Lovett, for the plaintiff in error.

Twiggs and Verdery, for the defendant in error.

BLANDFORD, J. Mrs. Knight obtained a judgment in the superior court of Richmond County against Robert J. Morrison for \$4,785.70, and caused an execution issued upon the same to be levied on eleven hundred acres of land in the county of Burke, known as the "Forth place." When this levy was made, a claim was interposed by Mrs. Lucy V. Morrison, the wife of the defendant in execution, Robert J. Morrison. Upon the trial of the claim case, Mrs. Knight showed possession in Morrison after she obtained her judgment. Mrs. Morrison relied upon a sheriff's deed made by one Byrd, under a writ of execution founded upon a judgment obtained in Burke superior court in favor of one Rozier against Robert J. Morrison, and Rozier himself as security for Morrison, for the sum of fifty-seven dollars. This execution had been levied by Byrd, the sheriff of Burke County (who with his wife were the usces in the judgment obtained by Rozier against Morrison and himself), upon eleven hundred acres of land, known as the "Forth place," the same land levied upon by the execu-

tion in favor of Mrs. Knight. The property was sold by Byrd, as sheriff, and brought the sum of \$550, or thereabouts, and was bid off by a man named Walker; and Byrd, as sheriff, executed a deed to Mrs. Lucy V. Morrison, the claimant in this case. It was shown that Morrison was present at the time of the sale. It was further shown, by the evidence, that the land levied upon consisted of several tracts or parcels, and that the same was worth from four thousand to six thousand dollars. When this execution for fifty-seven dollars, and the deed made to Mrs. Morrison by Byrd, were tendered in evidence, the plaintiff in execution, Mrs. Knight, by her counsel, objected to the same, upon the ground that the same were void, — 1. Because Byrd, being a usee in the execution for fifty-seven dollars, could not, as sheriff, levy; and 2. Because the levy was grossly excessive. The court overruled the objection, and this is excepted to, and is one of the main grounds of error alleged.

1. We are of the opinion that Byrd could not, under the circumstances of this case, have levied that execution; consequently he could not have sold the property and made a valid sheriff's deed to Mrs. Morrison; and the court erred in admitting in evidence the execution and the deed from Byrd, as sheriff, to Mrs. Morrison, she claiming as a purchaser under that sheriff's deed. It was not stated to the court by counsel for the claimant that they merely relied upon this sale and deed as showing a voluntary conveyance from Morrison to his wife, the claimant; but as it appears from this record, it was relied on by the claimant as a valid sale by the sheriff, and a valid deed executed by him to her. We do not think that it was; and for this reason we think the court erred in not sustaining the objection of counsel for the plaintiff in execution to the introduction of this evidence.

2. The next exception is, that the court erred, after allowing the *fi. fa.* and the deed of Byrd to Mrs. Morrison to go to the jury, in refusing to give, without qualification, a request in writing by the counsel for the plaintiff in *fi. fa.* to this effect: "If you find that the execution which sold the Forth place showed on its face that it was in favor of Byrd, the sheriff, and his wife, as beneficiaries, he could not have sold under that *fi. fa.* and conveyed valid title to Mrs. Morrison." He qualified by saying: "That is the law, unless the claimant has made it appear to you, by proof, that the interest of Byrd was gone at the time of the levy and sale."

We do not think the court should have qualified that request in the way he did. This execution in favor of Rozier has been paid off by Rozier himself, the plaintiff. He was both plaintiff and defendant. It was a very curious proceeding, and an anomaly to me, that a man should sue himself, being plaintiff as trustee and defendant as security upon a note given to himself as trustee. If he paid off the execution,—he paid it off, without more,—it was *functus officio*; it was invalid; it had served its purpose, and was dead; and a sale under it conveyed no title by the sheriff, and particularly by this sheriff who was the beneficiary in that identical execution. So we think the court ought to have given the instructions prayed for without any qualification whatever.

For these reasons we reverse the judgment of the court below in refusing a new trial. A new trial should have been granted. Judgment reversed.

EXECUTIONS.—No officer who is interested in a suit can serve any process appertaining to it, from the commencement to the conclusion: *Singletary v. Carter*, 1 Bail. 467; 21 Am. Dec. 480.

EXECUTIONS—SATISFACTION.—Payment on an execution satisfies it *pro tanto*, and it cannot afterwards be enforced unless the execution was assigned to the party making the payment, and an agreement made that the payment should not operate as a discharge: *Morris v. Lake*, 9 Smedes & M. 521; 48 Am. Dec. 724; *Welch v. Frost*, 1 Mich. 30; 48 Am. Dec. 692. Payment to the sheriff discharges an execution: *Murrell v. Roberts*, 11 Ired. 424; 53 Am. Dec. 419.

LOVELESS v. FOWLER.

[79 GEORGIA, 134.]

SALE BY AGENT ON CREDIT, WHERE THERE IS AUTHORITY TO SELL, though in violation of his principal's instructions, passes the title, and is not a conversion, where the purchaser has no notice of the limitation of the agent's authority.

TROVER CANNOT BE SUSTAINED AGAINST AN AGENT FOR SELLING THE GOODS OF HIS PRINCIPAL ON CREDIT, when his instructions were to sell for cash only.

DEMAND.—TROVER CANNOT BE SUSTAINED AGAINST A BAILEE OR AGENT BY HIS PRINCIPAL for goods in the possession of the former, in the absence of any demand for the possession of such goods.

TROVER by a principal against his agent. Judgment of nonsuit.

W. S. Pickrell, G. H. Prior, J. M. Towery, and W. F. Findley, for the plaintiff in error.

W. C. Howard and Claud Estes, for the defendant in error.

BLECKLEY, C. J. There was a bailment of goods to be sold for cash. The bailee sold a part on a credit, and a part remained unsold. He paid the bailor for a portion of them. The bailor then brought trover against him, requiring bail under the statute applicable to such actions. Pending the action, the defendant died, and his administrator was made a party. The alleged value of the stock was \$1,156.43, but how much was sold, unsold, or paid for does not appear.

1. There was authority to sell, and that being so, the sale on a credit was a mere violation of instructions as to the terms of sale. Such a sale would pass title, unless the purchaser knew of the violation of instructions, and a sale which passes title is not a conversion, though it may be an abuse of authority. It is like selling at a less price than that named in the agent's instructions. The broker's case, *Clark and Nunnally v. Cumming & Co.*, 77 Ga. 64, 4 Am. St. Rep. 72, is not in point. A sale on credit by an agent in possession of the goods, and authorized to sell for cash only, is not a conversion, —certainly not unless it appear that the purchaser had notice of the limitation in the agent's instructions.

2. The proper remedy against such agent is not trover, but an action on the case for violation of instructions or breach of contract. And in the present instance the class of remedy is material; for in trover bail is requirable, but in an action for breach of contract or for disobeying instructions it would not be.

3. Ruling as we do, that the credit sale was not a conversion, either of the whole stock or the part sold, and no demand appearing as having been made prior to the commencement of the action, we see no evidence in the record of any conversion at all on which to base a recovery. Unless an actual conversion by a bailee be shown, an action of trover against him will not lie without a previous demand for the goods and failure to redeliver.

4. In the argument here it was said that a demand could and would have been proved had the court not prematurely granted a nonsuit on the agreed statement of facts. We are thus called upon to construe the statement, so as to see whether the court below interpreted it correctly. The parties went to trial on a statement as to what evidence the plaintiff would introduce, and on which he based his right to recover, which statement was, that the goods (of the alleged value of \$1,156.43) were delivered by plaintiff to defendant to

be sold for cash, and plaintiff and defendant were to divide the profits, and the goods not sold were to be redelivered to plaintiff, and that plaintiff proposed to prove only that defendant sold a part of the goods and sold them for credit, and paid plaintiff for a portion of them, and there can be no identification of the goods sold or not sold, but plaintiff can only show that goods were turned over to defendant. This statement conceded that plaintiff could prove the facts recited therein, and them only, and was a virtual admission that no demand for the goods or any of them prior to the institution of the suit could be established; and the object of the statement being that the court might determine the law arising upon the recited facts as though they alone were in evidence before the jury, there was no error in ordering a nonsuit.

Judgment affirmed.

SALES BY AGENTS PASS TITLE WHEN: See extended note to *Veleian v. Lewis*, 3 Am. St. Rep. 201. As to what powers are implied as belonging to agents, see *Huntley v. Mathias*, 90 N. C. 101; 47 Am. Rep. 516, and extended note 518-521. The general rule is, that one who deals with an agent is bound to inquire and ascertain the nature and extent of his authority; but in the application of this general rule a special agency must be distinguished from a general agency; but in both cases private instructions as to the mode of executing the agency, not intended to be communicated to third persons, cannot affect the rights of one who deals with the agent, unless he has some actual notice thereof, or a knowledge sufficient to charge him with constructive notice: *Wheeler v. McGuire*, 86 Ala. 398; for a principal is bound for his agent's apparent powers, and if the act of the agent is within them, the principal is responsible therefor: *Commonwealth v. Hawkins*, 83 Ky. 246; *Bickford v. Menier*, 107 N. Y. 490.

TROVER. — DEMAND IS NECESSARY WHEN, AND WHEN NOT: *Veleian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and note 195; *Webber v. Davis*, 44 Ma. 147; 69 Am. Dec. 87; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118, and note; note to *Gilmore v. Newton*, 85 Am. Dec. 751; *Buel v. Pumphrey*, 2 Md. 261; 56 Am. Dec. 714; *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Armstrong v. Lindley*, 116 Ind. 295.

KILLIAN v. AUGUSTA AND KNOXVILLE RAILROAD CO.

[79 GEORGIA, 234.]

ONE RAILWAY IS NOT ANSWERABLE FOR INJURIES SUFFERED BY THE EMPLOYEES OF ANOTHER RAILWAY while passing over a track of the former upon a train of the latter, unless such injury was caused by a defective track or by some negligence on the part of the servants of the former.

ONE TRANSPORTED IN HIS CAR BY A RAILWAY COMPANY cannot recover for any damages occasioned by a defect in such car.

EMPLOYEE OF RAILWAY, WHO IS. — An employee of a railway who is sent by it over the track of another railway for the purpose of seeing that a train of cars belonging to the former railway is unloaded promptly is an employee of the former road, and not of the road over which he rides.

RAILWAYS—JOINT LIABILITY. — If an injury to an employee of a railroad while riding in the cars of his employer over another railway is jointly caused by the trucks or cars of the one and the track of the other, he is entitled to recover from the two railways in the proportion in which the cars of the one and the track of the other contributed to the injury.

PLEADINGS—WHAT MAY BE STRUCK OUT AS IRRELEVANT. — In an action by a widow to recover for the death of her husband, it is not error to strike from her complaint an averment that she has been deprived of the society, company, and companionship of her husband, and has been caused great mental suffering, and that their infant child has been left fatherless.

PRACTICE. — A PARTY MAY BE ALLOWED, AFTER THE TAKING OF A DEPOSITION, to propose second or additional interrogatories for the purpose of laying a foundation for the impeachment of a witness, nor does the party proposing such additional interrogatories thereby make such witness his own.

EVIDENCE. — IN AN ACTION TO RECOVER COMPENSATION FOR CAUSING DEATH OF PLAINTIFF'S HUSBAND, the defendant is entitled to prove, in addition to the ordinary expenses of such husband, what were his habits of life, and his manner of living and of spending money.

QUESTION OF WHAT IS ORDINARY CARE and what is negligence is one exclusively for the jury. Hence it is error for a court to instruct the jury that if a man having power to choose between two positions chooses the less safe, he must be presumed not to have exercised ordinary care, and if injured while occupying such position by the negligence of the defendant, when he would not have been injured had he occupied a position of greater safety, he cannot recover for his negligence.

ACTION to recover compensation for the death of plaintiff's husband. The court gave the jury the following instructions, which were excepted to by the defendant: —

“Where a railroad permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has intrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars.

"If you find, from the evidence, that, upon the train's reaching the depot of the Augusta and Knoxville railroad, the authorities of that road put a man upon the engine with direction to point out the grades and tight places in the curves, and that this man gave directions to the engineer how to run, and that the Augusta and Knoxville collected freight for this train, then for all legal purposes the train became the train of the Knoxville railroad, and it became liable for all damages caused in the running to the same extent as if itself owned the cars and engines.

"If you believe, from the evidence, that Mr. Killian, as an employee of the Port Royal railway, was sent by the superintendent of that road, together with the other employees on the train, to go up with it, and upon reaching and going upon the franchise of the Knoxville railroad, Killian continued with the other employees upon the train, with the knowledge or consent of the authorities of the Knoxville railroad, then he was rightfully upon the train; and if, while so upon the train, he was injured without fault or negligence upon his part, and could not, by the exercise of ordinary care, have avoided the consequences to himself, then the plaintiff is entitled to recover from the defendant such damages as the evidence shows he has sustained, unless the evidence shows to you that defendant's agents had exercised all ordinary and reasonable care and diligence to have avoided the injury.

"If the company permitted the cars of the Port Royal Railway Company to enter upon its franchise and charge freights for the use thereof, then it was liable for any acts of negligence in the running of the same, and for injuries caused while operating the cars, in the same manner as if the cars had belonged to the company."

The plaintiff also took certain exceptions, which, in the opinion, are styled her cross-bill of exceptions. The first of these was to the action of the court in striking from the plaintiff's declaration the words, "and their minor child, about twelve years old," and the words "depriving your petitioner of the society, company, and companionship of her husband," and the words, "has been deprived of the society, company, and companionship of her husband, causing her great mental pain and suffering, and leaving their infant child about twelve years old fatherless." It was claimed that the motion to strike out these words came too late, because not made until after two previous trials of the cause, and that the words so

stricken out were relevant and proper. The second cross-exception was to the action of the court in admitting a second set of cross-interrogatories to be taken by the defendant, and called additional interrogatories. The cross-interrogatories were proposed to the witness L. Frank Radford; and it was claimed that the defendant, before the examination in chief took place, had full knowledge of the facts inquired about. Plaintiff also claimed that by taking out the second commission the defendant had made Radford his own witness. The third cross-exception was because the court allowed Hayes, a witness for defendant, after stating on cross-examination the necessary expense of plaintiff's husband, to answer questions concerning his other expenses, his habits of spending money, his sociability, liberality, and the like. The plaintiff also excepted to the refusal of the court to give the following instructions asked for by her:—

"A railroad in Georgia is liable for all the injuries occurring to employees upon its cars, except that when an employee is hurt, and the injury occurs in connection with the business he is performing, or which his duties require him to perform, he must first show himself without fault or negligence; and the law thereupon presumes the company is at fault, and it will be liable, unless it shows that its agents have exercised all ordinary and reasonable care and diligence to avoid the injury.

"When an injury occurs, and the evidence does not show that it occurred in connection with the business about which the person injured was employed, and he shows he was not in fault, then the mere fact of the injury raises the presumption that it occurred from negligence of the road, and the road is liable, unless it shows that its agents have exercised all ordinary and reasonable care and diligence, or that the person injured consented to it or caused it by his own negligence, or could have prevented the injury to himself by the exercise of ordinary care"; and to the giving of the following instructions at the request of the defendant:—

(a) "In a case where there is no call of duty or necessity, and there is a choice on a railroad train between positions of relative safety, it is presumed that a prudent man will choose the one of greater safety; and if one having this choice occupies the position of less safety, the presumption is that he has not exercised the ordinary care enjoined upon him by law. And if, while occupying this position of less safety, he

is injured by the negligence of the railroad company, and would not have been injured if he had occupied a position of greater safety, he cannot recover damages for this negligence."

(b) "To apply this proposition to the case on trial: If you find that Mr. Killian was an intelligent and responsible man, and there was no call of duty or necessity upon him to occupy the position on the train from which he was thrown and killed; and if you find that this position of standing at the front of the first car of a train of flat-cars loaded with wood, and propelled from behind, was a position of less safety, and that he, having a choice of positions, chose this position of less safety, then the presumption arises that he did not act as a prudent man would have acted in the same circumstances, and he was wanting in ordinary care for his safety, which was enjoined upon him by law. Now, if you further find that he would not have been injured if he had chosen a position of greater safety, it becomes a case where the exercise of ordinary care on his part would have avoided the consequences to himself of any negligence on the part of defendant."

(c) "If you find that the position Mr. Killian occupied was wanting of ordinary care for his own safety, it is in no manner excused or palliated by the fact that others at the same time were occupying the same or like positions. Ordinary care is enjoined by law upon every responsible being, and the want of its exercise by others is an example to be avoided, not followed. The fault of one man is not excused by the like fault of others, no matter how numerous the latter may be."

(d) "In determining whether Mr. Killian was wanting in ordinary care for his safety, you will not be controlled by the fact that he was a railroad man, and justified in laying aside ordinary precautions. The danger inherent to the running of railroad trains is not less towards a railroad man than others. A position of danger is none the less so because occupied by railroad men. Every man is bound to perform his duty; and if duty calls a railroad man to a position of danger, of course it cannot be called a want of care on his part to assume it; but when duty does not require it of him, a railroad man is just as much bound to take a safer position and avoid a position of danger on a railroad train as any one else."

(e) "Mrs. Killian cannot recover for negligence of the defendant railroad if her husband has not exercised every precaution and used every diligence touching his safety that

caution and prudence would dictate to a sagacious man. And further, his being an experienced, intelligent railroad man, so far from excusing him from taking precaution for his safety, should teach, prompt, and dictate those precautions to him. His experience and intelligence should be used to protect him from injury, not to excuse him from fault."

J. S. & W. T. Davidson, for the plaintiff.

Joseph Ganahl, and Joseph B. Cumming, for the defendant.

SIMMONS, J. Catherine E. Killian brought suit against the Augusta and Knoxville Railroad Company for damages. She alleged that her husband, John H. Killian, was an employee of the defendant, and while engaged in the performance of his duties as such, without any fault or negligence on his part, and by the fault and negligence of the defendant, was thrown from a train of cars and run over and killed. She alleged that the fault and negligence of the railroad company consisted in the violation of the ordinance of the city of Augusta which prohibits the running of railroad cars through its streets at a greater rate of speed than five miles per hour; in the cars being so run through the streets of said city upon a defective curve, which was not the standard gauge by from half an inch to an inch and a half; in said curve not being properly elevated and lined up by from two to five inches; in allowing dirt, mud, etc., to accumulate in said curve, and not keeping the curve clear and cleaned out; and in not keeping a guard-rail on the lower side of said curve to prevent the wheel from mounting and running off on the upper side of said curve; and that by reason of this illegal running and these defects in the track of said company, the car upon which the plaintiff's husband was riding was thrown from the track, and he was killed.

The defendant filed a plea of the general issue, and other special pleas which appear in the record. Upon the trial of the case, the jury returned a verdict for the plaintiff. The defendant made a motion for a new trial upon the grounds set out in said motion, which was overruled by the court, and the defendant excepted and assigns the same as error. The plaintiff also filed a cross-bill of exceptions, alleging errors in the rulings of the court during the progress of the trial, and on certain charges of the court which are set out in the cross-bill of exceptions, and which will be referred to farther on in this opinion.

It appears from the record that the Augusta and Knoxville

Railroad Company had only completed its track a short distance, to wit, from their depot in the city of Augusta to the Sibley mills; that they had not commenced doing a general business; that they had no rolling stock of their own, but sometimes would hire engines and cars to transport freight from their depot in the city to said Sibley mills. It appears further, from the record, that Mr. Fisher, a wood-dealer in the city of Augusta, had engaged a train of the Port Royal and Augusta railroad (running from Port Royal, South Carolina, to Augusta), and had it loaded with wood or slabs in the state of South Carolina, and transported to the city of Augusta over said Port Royal and Augusta railroad. This load of wood or slabs had been sold or engaged by him to the Sibley mills. Wishing to avoid the expense of unloading from one train and loading upon another after the train arrived at the depot of the Port Royal and Augusta railroad in the city of Augusta, Fisher obtained the permission of Mr. Fleming, the superintendent of the Port Royal and Augusta Railroad Company, for the train to proceed from the depot of the latter on the track of the Georgia Railroad Company, and thence over the Augusta and Summerville railroad, which connected with the Augusta and Knoxville railroad, and to proceed along the track of the latter road to the Sibley mills. The train consisted of eight flat-cars loaded with wood, pushed forward by a locomotive from behind, and manned by employees of the Port Royal and Augusta railroad. John H. Killian, the plaintiff's husband, was by direction of Mr. Fleming, the superintendent, to accompany this train to the Sibley mills, for the purpose of seeing that it was unloaded promptly and returned to the Port Royal and Augusta railroad. When the train arrived at the depot of the Augusta and Knoxville railroad, an arrangement was made with Mr. Twiggs, the superintendent of the latter road, for it to proceed to Sibley mills. Twiggs, the superintendent, ordered one Steve Burton to go upon the engine and act as a pilot, and inform the engineer of the curves and "tight places" in the track. Twiggs, together with Killian and two others, mounted the front flat-car, and Twiggs gave the signal to start. The train proceeded from the depot of the Augusta and Knoxville railroad toward the Sibley mills, and when about to reach the curve of the road on Greene Street, Burton told the engineer to put on more steam or he would be stalled at the curve. The engineer did put on steam, and the front wheels of the front

car ran off on or about the crossing where the curve was situated. Killian and others were standing on top of the wood, and when the front wheels left the track, the standards which held the wood were broken, and the wood fell, precipitating Killian under the wheels of the car, which ran over him and killed him. Twiggs and the others escaped injury. These are the main facts in the case, as disclosed by the record.

1. Under the view which we take of this case, it is unnecessary for us to pass upon each and all of the assignments of error set out in the motion for a new trial. It occurs to us that the case was submitted to the jury by the court on a wrong theory. The court seemed to think that this case was governed by the ruling in the case of *Macon etc. R. R. Co. v. Mayes*, 49 Ga. 355; 15 Am. Rep. 678. We do not think that the principle ruled in that case is applicable to this case, according to the facts disclosed by the record. In this case, the train, with all the employees necessary to manage it, belonged to the Port Royal and Augusta railroad; and we think that the only duty or obligation owed by the Augusta and Knoxville railroad to these employees was to have a reasonably safe track over which their cars were to be transported. In the case in 49 Georgia, *Mayes* was acting fireman on a train of the Macon and Augusta Railroad Company, and was injured by that train's coming in collision with the Georgia railroad train, which the Macon and Augusta Railroad Company had allowed to come upon their track. In that case, it was not ruled that if any of the employees of the Georgia railroad had been injured, the Macon and Augusta railroad would have been liable; but it was ruled that the Macon and Augusta railroad was liable to third persons and to the public for allowing this Georgia railroad train to come upon its franchise. If Killian had been in the employment of the Augusta and Knoxville railroad, or if he had been a citizen not connected with either of the roads, and had been injured by the running of this train belonging to the Port Royal and Augusta railroad, the Augusta and Knoxville railroad would have been liable, under the ruling in 49 Georgia. But as he was an employee of the Port Royal and Augusta railroad, whose train had been sent upon the track of the Augusta and Knoxville railroad for the purpose of delivering its freight, we do not think that the latter road is liable to him for any injury, unless it was caused by the defective track, or some negli-

gence on the part of the servants of the Augusta and Knoxville railroad. If a person brings his own car to be transported by a railroad company, that company would certainly not be liable to him for any damages occasioned by a defect in the car itself; but as to third persons, persons not belonging to that particular car, the company would be liable.

As this case is to be sent back for a new trial, we will decide the law applicable to the case disclosed by the record, so that the court may submit the same to the jury in accordance with the views we entertain of the law under the facts now before us.

We hold, under the facts disclosed by the record, that Killian was not an employee of the Augusta and Knoxville railroad; and therefore the charges of the court as to whether Killian was free from fault and negligence as an employee of the Augusta and Knoxville railroad, and the latter in fault, were not applicable to the case.

2. We hold that he was an employee of the Port Royal and Augusta Railroad Company, and that the only obligation the Augusta and Knoxville railroad was under as to him was to furnish him a safe track on which his train might be safely run. And if the Augusta and Knoxville Railroad Company failed to do this, and he was injured solely by the defect in the defendant's track, the plaintiff would be entitled to recover in this suit.

3. We hold that if the injury to Killian was occasioned solely by a defect in the trucks of the car belonging to the Port Royal and Augusta railroad, the plaintiff would not be entitled to recover.

4. We hold that if the injury was caused both by a defect in the track and a defect in the trucks, then the plaintiff would be entitled to recover in the proportion the defect in the track, as compared to the defect in the trucks, contributed to the injury.

5. The Augusta and Knoxville railroad, as to the safety of its track, was liable to Killian as a passenger; and if the injury was caused solely by a defect in the track, and he was not negligent, or could not have avoided the injury by the exercise of ordinary care and diligence, the plaintiff would be entitled to recover the amount of damages she has sustained. If he was negligent, but could not have avoided the injury caused by the defendant's negligence by the exercise of ordi-

nary care, then the damages should be diminished as in cases of contributory negligence.

6. The defendant in error in this case filed a cross-bill of exceptions on various grounds set out therein, and as the case is to be sent back for a new trial, it becomes our duty to pass upon them.

There was no error in striking from the plaintiff's declaration the words set out in the cross-bill of exceptions. They were totally irrelevant to the case; no evidence could have been introduced to sustain them, and they ought not to have been in the declaration. There was no error in ruling out the testimony of Mrs. Killian going to sustain the allegations stricken from the declaration.

7. There was no error in allowing a second set of cross-interrogatories sued out by the defendants for L. Frank Radford in this case. While it was true that the defendants had crossed the original set of interrogatories sued out for Radford by the plaintiff, yet after they were executed and returned to the court, the defendant, wishing to propound additional cross-interrogatories, had, in our opinion, a right to sue out additional cross-interrogatories to lay the ground for an impeachment of said Radford, and did not thereby make him its witness.

8. The question as to whether one of the commissioners taking the interrogatories was attorney for the defendant in this case was submitted to the court, and he having determined, from the evidence before him, that he was not an attorney, and the evidence sustaining his finding, we do not interfere therewith.

9. We see no error in allowing the answers to the questions propounded to John M. Hayes as to the personal expenses of Killian. We do not think that the rule as heretofore existing in this state limited personal expenses of the deceased to be deducted from the recovery simply to his food and clothing; but that the personal habits of the deceased, his station in life, his means, and his manner of living, might be proved for the consideration of the jury, and they be allowed to deduct what they might consider from the testimony to be his reasonable personal expenses, taking all these things into consideration.

10. As will be seen from our views in the former part of this opinion, there was no error in the court's refusing to give in charge the requests to charge of the plaintiff in error in the cross-bill of exceptions.

11. We think the court erred in giving in charge the re-

quests of the defendant in the court below, as set out in the cross-bill of exceptions, and marked A, B, C, D, and E. The question of what is ordinary care and what is negligence is one exclusively for the jury, and the court in this charge takes this question from their consideration. In the case of *Richmond and Danville R. R. Co. v. Howard*, 79 Ga. 44, Bleckley, C. J., in rendering the opinion, says: "The court cannot instruct the jury what a prudent man would do; for, in legal contemplation, the jury knew it better than the court. If instructions on that subject had to be given, the jury would be the instructors and the court the instructed; that is, the jury would charge the judge on that part of the case, rather than receive a charge from him. It is not for the court to teach the jury the ways of the prudent man, but to warn them of the duty on the part of all others to make their ways like his. The court cannot point out to the jury specifically the ways of the prudent; the law supposing those ways better known to the jury than to the judge."

The other exceptions in this cross-bill are covered by the rulings in the former part of this opinion.

Judgment reversed upon the original and cross bill of exceptions.

NEGLIGENCE. — When a question of law for the court, and when a question of fact for the jury: *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387, and note 398; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813; *City R'y Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798, and note 801, 802; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note; *Parsons v. New York Cent. etc. R. R. Co.*, 113 N. Y. 355; 10 Am. St. Rep. 450, and note; *East Line etc. R'y Co. v. Scott*, 71 Tex. 703; 10 Am. St. Rep. 804, and note; *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; ante, p. 87, and note; *Village of J. v. Chapman*, 127 Ill. 438; ante, p. 136, and note; *Bennett v. Hazen*, 66 Mich. 657; *Columbus etc. R'y Co. v. Bradford*, 86 Ala. 574.

MEASURE OF DAMAGES FOR DEATH OR PERSONAL INJURIES: See *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; ante, p. 58, and note; *Richmond etc. R. R. Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827, and note.

TWO RAILWAY COMPANIES USING SAME TRACK — RESPECTIVE LIABILITY: Compare *Georgia R. R. etc. Co. v. Friddell*, 79 Ga. 489, post, p. 444.

TERRY v. RODAHAN.

[79 GEORGIA, 278.]

POWER TO CONVEY — HOW MAY BE EXERCISED. — Conveyance in form proper and sufficient to transfer the grantor's title, if any he had, will, in the event of his having no title, be regarded as in execution of a power of sale vested in him as the executor of his deceased wife's estate and trustee of their children.

INTENTION TO EXECUTE A POWER SUFFICIENTLY APPEARS. — 1. When there is some reference to the power in the instrument of execution; 2. Where there is a reference to the property which is the subject-matter on which the execution of the power is to operate; 3. Where the instrument of execution can have no operation unless in execution of the power.

CONVEYANCE MAY OPERATE AS AN EXECUTION OF A POWER, though the grantor supposed himself to be the owner of the property, and the conveyance to be a transfer of his title.

INSTRUCTIONS — QUESTION FOR JURY. — In an action of ejectment, where the defendant claims under a conveyance alleged to have been executed and then lost, it is error for the court to take from the jury the question whether such deed was executed or not, or to instruct them that if they believe that defendant bought the land, paid for it, and went into possession under his purchase, he got the legal title, whether a deed was made or not.

EXECUTION OF POWER OF SALE — ABSENCE OF CONVEYANCE. — Sale of land by a person in his individual capacity, attended by payment of the purchase-money and entry into possession by the purchaser, but not followed by any conveyance, cannot be regarded as a valid execution of a power of sale lodged in the vendor as executor or trustee, where it is not shown that the proceeds of the sale were applied to the benefit of the *cestuis que trust*.

ESTOPPEL. — IF A DEED DOES NOT OPERATE TO PASS TITLE WHEN IT IS MADE, because the grantor has none, and he afterwards inherits an interest therein, such interest will pass to his grantee on the principle of estoppel, under the code of Georgia.

EVIDENCE. — ADMISSIONS OF AN ANCESTOR, which could affect him were he a party, are receivable in evidence against his heirs. Hence, in an action where the plaintiffs' title is partly as heir of their father, a letter written by him tending to show that he had made a sale and conveyance of the property to the defendant is competent evidence against such heirs.

PARTY AS WITNESS AGAINST DECEASED PERSON. — In an action by an heir to recover possession of realty, the defendant is a competent witness in his own favor, notwithstanding the death of the plaintiff's ancestor, under whom both parties claim, as to any matters except such as transpired between defendant and such ancestor.

EJECTMENT, in which defendant recovered judgment. The plaintiff moved for a new trial. The third, fourth, and fifth grounds of the motion were based upon the action of the court admitting in evidence an envelope addressed to "John Rodahan, McDonough, Georgia," and the letter contained in such

envelope, dated "Hawkenville, December 20, 1869," and signed "A. T. Burke." The sixth ground of the motion for new trial was because the court charged the jury, that if they believed that A. T. Burke was trustee or executor, and while invested with power as such he made a deed to John Rodahan of the land in controversy, then the law presumes that he did so as executor or trustee; for it presumes that a trustee or executor, when dealing with the property which he holds as such, acts in accordance with the powers given to him as trustee or executor. The ninth ground of the motion for a new trial was to the action of the court in saying, in its instructions to the jury, in connection with the charges otherwise in form the same, as the charge excepted to under the sixth ground; that "the law presumes that every man does his duty." The plaintiffs' eleventh ground of exception was, that the court allowed John Rodahan to testify, Burke, the plaintiffs' trustee, then being dead.

W. J. Albert, for the plaintiffs in error.

R. L. Richards, G. W. Austin, and G. W. Bryan, for the defendants in error.

BLECKLEY, C. J. In December, 1883, Mrs. Terry brought ejectment against Rodahan to recover about forty acres of land lying within and adjacent to Carrollton, together with mesne profits. Several demises were laid in the declaration, but only her own had any essential bearing on the result. Her mother (Mrs. Burke), who died testate in October, 1862, owned the premises, and disposed of them by will. The will bore date September 7, 1862, and was admitted to probate in common form, and recorded in January, 1863, and letters testamentary were ordered to issue. Her children, three in number, a son and two daughters, were the objects of her bounty; to them she bequeathed the whole of her estate, including slaves, choses in action, and other personalty, together with the premises involved in this action. The third item of her will was as follows: "I will and bequeath to my aforesaid children the house and land where I now live, consisting of some forty acres, more or less, in the town of Carrollton; to have and to hold the same to them and their heirs forever in fee-simple."

The seventh item was in these words: "I hereby direct, request, and fully empower my husband, Archibald T. Burke, the father of my children, to take charge of all the aforesaid

property at my death, and manage it to the best advantage for my dear little infant children, and in regard to said property to act as their trustee, after settling my debts; and he is fully empowered, either in the capacity of trustee or executor, to sell any of the above property, either at private or public sale, should he deem it for the interest of said children, and vest the proceeds of the sale in other property, or put the money at interest, as he thinks best, he being clothed with full and ample power to manage said property as he thinks for the best interest of my said children. And as my said children arrive at the age of twenty-one years, or in case the girls should marry, I direct my said husband to give each one off her equal share of the property. And it is my express wish and intention that in no case shall the property that I have hereby given my daughters, or either of them, be subject to any debt contracted by their or either of their husbands, either before or after marriage, but should be for the mutual benefit of them and their husbands or husband, and their children, should they have any. And the little property that I have hereby given my son, I direct his father, when he becomes of age, to turn it over to him, if he is sober, steady, and industrious, and shows a disposition to take care of it; but should he, unfortunately, be wild and dissipated and a spendthrift, I hereby direct his father to withhold from him the little that I have here left, until such time as he becomes sober, steady, and capable of taking care of it."

The eighth and last item appointed the husband sole executor. The first item mentioned a debt due to Mandeville and Stewart as the only one which the testator owed, directed the executor to pay it with as little delay as possible; to collect and apply certain money due her for the hire of negroes, and should the same not be sufficient to discharge said debt, to "hire said negroes, or such numbers of them as he thinks proper for the purpose of discharging said debt, unless he should meet with a favorable opportunity to sell said land."

Of the three children, Mrs. Terry, the plaintiff, is the sole survivor, her sister having died in November, 1865, aged six years, and her brother in October, 1867, aged ten years. Her father, A. T. Burke, the executor and trustee, died in January, 1882. The plaintiff was born in April, 1856, and married in April, 1874. This action was commenced on December 29, 1883.

The defendant, Rodahan, pleaded the general issue, pre-

scription by seven years' adverse possession with color of title, prescription by twenty years' adverse possession, also the limitation act of 1869.

At the trial he was the sole witness as to his possession, though the premises are situate a part within and the residue just outside of a populous county town. His possession was exceedingly sluggish and indolent; of the remittent, if not also of the intermittent, type, its general characteristic being typhoid. Such as it was, it began in December, 1864, but Mr. Rodahan did not pay taxes on the property or return it for taxation until 1872, his reason for the omission being that a law was passed just after the war exempting wild land from taxes. This law was altogether imaginary, and had it been real, his classification of improved town property as wild land would be quite novel and anomalous. But admitting his classification to be correct, what becomes of actual adverse possession? When the land is wild, is not the possession also wild?

1. The serious part of the defense, however, was not prescription, but an alleged purchase from A. T. Burke (the executor and trustee), and a conveyance by deed from him to Rodahan; the contention being that this deed, taken in connection with Mrs. Burke's will, passed her title into Rodahan and divested her children, the plaintiff included, of all interest in the premises. There was evidence tending to prove the purchase, the payment of the price (which was three thousand five hundred dollars in confederate money), the existence of the deed, the death of the attesting witnesses, the contents of the instrument, its loss, that it was never recorded, etc. If made at all, it bore date in November or December, 1863, purported to be made, signed, sealed, and delivered by A. T. Burke, not as executor or trustee, nor by virtue of any will or other power, but simply as A. T. Burke, was attested by two witnesses, one of whom was a justice of the peace, conveyed the premises to Rodahan in fee-simple, with general warranty of title, and acknowledged the payment of three thousand five hundred dollars as consideration. These particulars are taken from a copy in the record (most probably dictated by Rodahan), testified to by him as correct without explanation of how the copy originated, or how he verified its correctness to his own mind. He also testified that his possession commenced and was held under the deed; that "until yesterday," he never heard of the will, or knew that

Burke was trustee, and that he paid the purchase-money in full.

Supposing all these facts established as to purchase, payment, and taking a conveyance, did the deed of A. T. Burke, making no reference to the power, and containing no allusion to his representative character, either as executor or trustee, operate as a valid execution of the power of sale conferred by the will? It is manifest from the record that though Burke originally bargained with Mandeville and Stewart for the property, he never acquired title to it in his own right, but that Mandeville and Stewart conveyed it in the year 1859, with his consent, to Boggus, as trustee for Mrs. Burke, and that Mrs. Burke was the sole and exclusive owner at the time of her death. Her will was probated and admitted to record on Burke's application as the nominated executor, and the instrument contains a distinct reference to a marriage settlement conferring upon her power and authority to dispose of her property. Burke's assent to the will, if it needed his assent to render it valid, was thus beyond question. His precise legal relations to the premises in dispute at the time he is alleged to have conveyed to Rodahan was that of executor to his wife's will and trustee for the children, with power to sell in either capacity, at public or private sale, and with no interest whatever in the property, legal or equitable, as an individual. His deed, if left to work by his own interest, would not work at all, for he had no interest; it had to work by the power, or pass nothing.

Amongst the multitude of cases touching the execution of powers without recital of the power or any reference to its existence, comparatively few relate to sales of real estate by executors or trustees; the great mass of them deal with the power of appointment, and most of these concern appointments by will. There is, however, a general thread of principle which runs through all the authorities, and a general agreement of the authorities respecting the principle. The principle may be stated thus: An instrument which will serve to execute a power, and which purports to convey the specific realty to which the power applies, will be referred to an interest, and not to the power, if the maker had an interest on which the conveyance could attach; but if he had no such interest, it will be referred to the power, and be treated as made in execution thereof.

"A donee of a power may execute it without referring to it,

or taking the slightest notice of it, provided that the intention to execute it appear.

"Where a man has a power to limit uses, and no power to convey the land, if he convey or devise the land generally, and the circumstances required to the execution of the power as to subscription, witnesses, etc., are observed, the conveyance or devise shall inure as a limitation of the use, because otherwise it would be void.

"And as a general disposition of the very property will amount to an execution of the power, so where there are several powers in one person over different estates, a like disposition of them all will operate as an execution of all the powers.

"If a man have two general powers over the same estate, with different circumstances, and do an act without referring to the powers which may be valid as an exercise of one of them, it will be deemed an execution of that power which will support the disposition": 1 Sugden on Powers, 356, 357.

"Where, however, the power is not referred to, the property comprised in it must be mentioned, so as to manifest that the disposition was intended to operate over it; the donee must do such an act as shows that he has in view the thing of which he had a power to dispose": Id. 367.

"Upon these distinctions it has been held that, where otherwise part of the disposition would be void and the words remain unsatisfied, the words, if specific in their nature, will apply to the real estate in the power. Therefore, if the subject of the power be real estate, and the donee make a general devise of all his real and personal estate, and has no real estate, the estate subject to his appointment will pass, for the gift as to the real estate is specific, and as there is no other subject for it to attach upon, it must refer to that over which the testator has a power": Id. 377.

"The power may be executed without reciting it, provided the act shows that the donee had in view the subject of the power. . . . The general rule of construction, both as to deeds and wills, is, that if there be an interest and power existing together in the same person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. If there be any legal interest on which the deed can attach, it will not execute a power. If an act will work two ways, the one by an interest, and the other by a power, and the act be indifferent, the law will attribute it to the interest, and not to

the authority; for *factio cedit veritati*": 4 Kent's Com., side pp. 234, 235.

"The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power. The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear, — 1. When there is some reference to the power in the instrument of execution; 2. Where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and 3. Where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a power. Thus if a donee of a power to sell land have also an interest in his own right in the same land, his deed of the land, making no reference to the power, will convey his own interest; for there is a subject-matter for the deed to operate upon, excluding the power, and therefore, as it does not conclusively appear that the deed was intended to be an execution of the power as well as a conveyance of the grantor's interest in the land, it will be held not to be an execution of the power; but if the grantor has no interest in the land, his deed will be insensible, and a mere absurdity, if not intended as an execution of the power; therefore, it will be held to be an execution of the power if it refers to the subject-matter of the power, or describes the land over which his power extends. It will be seen that this last conclusion is a presumption of law; this presumption may be more or less strong, according to all the circumstances of the case and the condition of the property. If all the words of a deed or will can have an effect given to them, and an operation upon property or rights, without being taken as the execution of a power, they will not be an execution of such power. If a man has several powers, and refers to some, and not to others, the execution will exclude those not referred to. From these propositions it may be seen why a conveyance of specific property, or a specific devise of property, will generally operate as the execution of a power, if the grantor or testator has no other interest in the property but the power, although he makes no reference to the owner in his deed or will": 2 Perry on Trusts, sec. 511 c; *Blagge v. Miles*,

1 Story, 427; *Carver v. Jackson*, 4 Pet. 97, 98; *Carver v. Morris*, 6 Id. 619; *Hamilton v. Crosby*, 32 Conn. 342; *Bolton v. Jacks*, 6 Rob. (N. Y.) 168, 228; *Coryell v. Dunton*, 7 Pa. St. 530; *Pease v. Pilot Knob*, 49 Mo. 124; *Wetherill v. Wetherill*, 18 Pa. St. 265; *Keefer v. Schwartz*, 47 Id. 503; *Bingham's Appeal*, 64 Id. 345; *Drusadow v. Wilde*, 63 Id. 170; *White v. Hicks*, 43 Barb. 64; 33 N. Y. 383; Crabb on Real Property, secs. 1994, 2037, 2039.

In *Doe v. Sturges*, 7 Taunt. 217, one of three executors was devisee for life, with power to lease the premises for not exceeding twenty-one years, and a like power, exercisable after his death, was granted to the surviving executor. The tenant for life entered and made a lease for forty-two years, reserving rent to himself. This lease, though made by him in his own name, and not as executor, was held to take effect for its full term out of his legal interest as executor, his mere entry and thereafter making a lease inconsistent alike with his estate as tenant for life and his duty as executor not being evidence even of his own assent to the legacy, which assent was necessary to clothe him with the right to lease in his character of tenant for life. In other words, not having at the time of granting the lease any right to grant it as an individual, he was held to have granted it as executor, though he did not, in executing the lease, profess to act in that capacity. The opinion of the court was delivered by Chief Justice Gibbs.

In *Allison v. Kurtz*, 2 Watts, 185, a testator directed that all his lands be sold by his executor, and that the proceeds, over and above certain pecuniary legacies to his daughters, be divided amongst his sons, one of whom, Robert by name, qualified as executor of the will. The executor did not sell, but the sons, regarding the lands as their own, divided them by metes and bounds, and interchanged warranty deeds of bargain and sale amongst themselves so as to give effect to their scheme of voluntary partition. The deeds referred to the father's will, but described it as bequeathing the lands directly to the sons. Richard, the executor, participated in this transaction, but only as an individual, not as executor, executing deeds, as did the rest, in his private and personal capacity. A parcel of land thus conveyed to one of his brothers was sold by the latter on the same day, and afterwards passed into the hands of Kurtz, who was a purchaser for value. Richard, as trustee for his sisters, whose pecuniary portions had not been paid, brought ejectment against Kurtz, and sought to recover,

notwithstanding his own deed under which Kurtz claimed. The court, holding that no title to the lands passed under the will to the testator's sons, but that Richard, as executor, by virtue of a statute of Pennsylvania, took the whole title, nevertheless decided that the deed of Richard operated upon the premises in dispute by reason of the power of sale conferred by the will, and was a good execution of that power. In delivering the opinion, the court, by Sergeant, J., said: "Here was a design to convey the estate, manifested by a sufficient deed of bargain and sale. The parties supposed it was valid as a conveyance of interest, and the deed did not recite or refer to the power of Richard under the will. The fact turns out to be that no interest existed. The deed then derives validity from the power which the grantor, Richard, clearly had under the will; because the estate can pass in no other way. It was at best only a mistake as to the form of the conveyance; and though the power is not referred to, the vendee has the right, under established legal principles, to consider it as a muniment of title, and to resort to it for support when the supposed foundation of his title proves insufficient." This case clearly rules that an executor, having title as such, but no title as an individual, may pass title by his warranty deed made as an individual, the will giving him power to sell as executor. In order to uphold the alleged deed of Burke to Rodahan as a conveyance of all that Burke could convey in his character of executor, it is not necessary to go further than this case leads, if in truth Rodahan purchased of Burke, paid value, and took his deed.

Much is said in the books of an intention to exercise the power, and where a purchaser for value is not concerned, the absence or presence of such intention in actual consciousness, as matter of fact, may be the general test of efficacy. But even then it is questionable whether a certain and specified intention to dispose of the identical property covered by the power, though no thought of the power were present to the mind, is not the only intention necessary where there is in fact no interest apart from the power. Sugden says: "If the intention to pass the property can be collected, it will pass under the power, although the donee supposed that it would work by force of his interest. There is no conflict; he intends the property to pass, and thinks he has all the interest in it, whereas he really has only a power. The intention governs, and the power will support the disposition": 1 Sugden on Powers, 421.

Every purchaser of realty for value takes the risk of his vendor being clothed with power to sell at the time of the sale, and by the mode of sale adopted; but he is not bound to know from whence the power is derived, or whether it springs from ownership or by delegation in trust. It is enough that there be authority to sell and convey, when and how the sale is made, and the conveyance executed. If the vendor actually sell and convey, his intention to do so is manifested, and whether in his own mind he means to do it in one character or another, the purchaser need not know nor inquire, provided only that the sale and conveyance be such as the vendor has a legal right to make. If the rules of law applied to the conveyance in the actual circumstances treat it as sufficient to pass the title, it will have that effect. Of course the purchaser could derive no title through any breach of trust, or fraud, on the part of the trustee, of which he had notice or to the accomplishment of which he knowingly contributed. Nor would he, as against beneficiaries of the trust, take any title which the trustee could not impart at the time in the mode pursued: *Knorr v. Raymond*, 73 Ga. 774, and cases cited.

Our conclusion is, that if Rodahan purchased from Burke, not knowing of the will, paid the purchase-money, and took a deed from Burke, he thereby acquired the title, both legal and equitable, to the premises in dispute.

2. But we think the jury should have been so instructed as not to relieve them from deciding whether the deed was made or not. Rodahan did not set up or adduce any testimony to a mere parol purchase, but relied on a purchase consummated by a conveyance in writing. Moreover, he did not profess to have dealt with Burke as executor or trustee, but testified, on the contrary, that he did not know he was trustee, and had never heard of the will. For these reasons, it was error to charge the jury, as set out in the tenth ground of the motion for a new trial, that "if you believe, from the evidence, that the defendant bought said land from A. T. Burke, as trustee or executor, and paid the purchase-money therefor, and went into possession under such purchase, then I charge you that defendant got the legal title to the premises in dispute, whether any deed was made or not."

We have above indicated sufficient cause for disapproving this charge; but were the charge applicable to the facts of the case, it would still be open to the grave question whether a sale of land made by a person in his individual capacity, at-

tended with payment of the purchase-money, and entry into possession by the purchaser, would be a valid execution of a power to sell lodged in the vendor as executor or trustee. Is it not going far enough to treat an individual deed as sufficing to execute a trust power? Are there not considerations, both of principle and policy, against allowing a trustee to part with title to the trust land, especially to contract it away as his own, without affording written evidence of alienation? Powers of selling realty are to be executed in the mode, if any, prescribed in the instrument which creates them; and if none is prescribed, should it not be implied that the mode in general use for conveying land is the one to be observed? Crabb on Real Property, secs. 1987, 2032; *Boshart v. Evans*, 5 Whart. 562. In *Silverthorn v. McKinster*, 12 Pa. St. 67, a sale of land made by executors, as such, though in parol, with possession delivered, was held a good execution of their power of sale, so far as to pass an equitable estate; and a previous Pennsylvania case is cited as so ruling: *Taylor v. Adams*, 2 Serg. & R. 534. These cases relate to sales by executors in their character as executors, and hence their doctrine would not be broad enough to include the present case,—one in which the purchaser dealt with his vendor, paid him, and took possession under him as an individual, and not as filling any fiduciary capacity. To say that he could thus acquire a perfect equity equivalent to the legal title, without even showing that the trust estate got the benefit of the purchase-money, would seem to be going quite beyond both principle and authority. In the absence of a deed, or writing of any kind, it would be little enough for even a court of equity, as a condition of aiding the purchaser in perfecting his title, to require him to show that purchase-money paid to the vendor as money of the vendor personally was treated by the latter as trust funds and applied for the use of the trust estate. Nothing said in *White v. Cook*, 73 Ga. 164, militates against this suggestion, construing the opinion delivered in that case as a whole, and as taking tone and color from the facts on which it was predicated.

8. We also think that the charge of the court set out in the sixth and ninth grounds of the motion for a new trial should have been omitted as inapplicable to the precise facts of the case, and as giving undue support by mere presumptions of law to a theory (favorable to but not advanced by the defendant) that the deed was made by Burke as executor or trustee. There was absolutely no evidence that Burke made the deed

as executor or trustee, and the copy which Rodahan verified as correct did not so import. Moreover, the founding of one presumption on another, such as the law presumes that every man does his duty, and therefore the law presumes this man did so and so, is not a safe mode of stating presumptions to a jury, where there is any chance of misapplying the wider presumption to some other part of the case. The presumption that every man does his duty is liable to great abuse. On it alone the jury might by a blunder always find for the defendant. If every man does his duty, no plaintiff ought to recover. The charge as to the nature and effect of the alleged deed (adapting the charge to the evidence in this record) ought to have been, in substance, that if Burke, as an individual, after qualifying as executor, and while still in office as executor, made a deed of bargain and sale, duly executed, conveying the premises to Rodahan, and Rodahan paid him therefor a valuable consideration, not knowing of the will or that he was executor, the deed operated as an execution of the power of sale created by the will, and its legal effect was to pass the title into Rodahan. The reason for making here no reference to Burke's character as trustee is, that while his power to sell as executor extended to a sale for the payment of the debt of his testatrix, his power to sell as trustee, perhaps, did not, and may not have been legally exercisable until after that debt was paid; and it seems the debt has not even yet been paid in full. The reason for making no allusion to an interest in Burke as an individual is, that, according to the evidence now in the record, he had no such interest when the deed is alleged to have been executed, nor is there any evidence tending to show that he had.

If for any reason the deed would not operate to pass title under the power of sale in the will, then if Burke afterwards inherited from his deceased children an interest in the premises, that interest would pass to Rodahan by virtue of the deed on the principle of estoppel: Code, sec. 2699; *Parker v. Jones*, 57 Ga. 204. Of course this aspect of the case as to the effect of the deed on that interest in the event supposed would be proper matter for instructions to the jury.

4. A letter written by A. T. Burke to Rodahan in December, 1869, was offered in evidence by the latter, and admitted over objections for irrelevancy, etc., by the court: Fourth ground of the motion for a new trial. The letter is copied at length in the record. It speaks of "our land trade"; says the

land was bought by Burke of Appleton Mandeville; states, as matter of law, that the vendor's lien is waived by taking personal security; that there is no vendor's lien as against a purchaser without notice, and as matter of fact that he (Burke) knows Rodahan to be such a purchaser. It purports to be a reply to a letter from Rodahan, and expresses the hope that his fears, if he has any, will be quieted. If the plaintiff, Mrs. Terry, claimed alone under the devise to herself in her mother's will, there might be some doubt as to the admissibility of this letter; at all events, its admissibility would be less obvious. But she sues for the whole land, the whole interest in it, and in addition to her own demise lays demises severally from her deceased father, brother, and sister. Of course on these demises from deceased persons there can be no recovery: *Head v. Driver*, 79 Ga. 179; but they serve to make plain her purpose not to limit her own demise to the one undivided third interest which she took by the will.

By our law of descent, she and her father inherited equally from her brother and sister; so that her father, if he made no sale to Rodahan, was owner of one third, and she of two thirds of the premises, when the letter was written, both of the deceased children having died before that time. The contents of the letter were thus declarations made by her father against his interest. And if the one undivided third interest inherited by him passed on his death to the plaintiff as his sole heir at law, she, claiming now in privity with him, would be affected by his admissions, so far, at least, as the interest derived from him by inheritance is concerned. It surely needs no authority to prove that admissions of the ancestor which would affect him were he the party are receivable in evidence against the heir. We have seen already that if the alleged deed was made by Burke under circumstances that prevented it from passing the trust title, it would transmit to Rodahan any title which Burke may have acquired in his own right after the execution of the deed. Thus the deed would be a defense to the action as to one undivided third of the premises. The letter was strong circumstantial evidence that such a deed, or at least some deed to Rodahan, had been executed by Burke, and the paper being lost, and the subscribing witnesses as well as Burke being dead, circumstantial evidence to prove execution was admissible, and might be sufficient to establish the fact: *Payne v. Ormond*, 44 Ga. 515. That the letter refers to these premises is morally certain, from several

allusions found in it, one to Appleton Mandeville, who, together with Stewart, executed the deed to Mrs. Burke's trustee, and gave his testimony at the trial.

5. The only remaining question necessary to notice is, whether Rodahan was a competent witness in his own favor, notwithstanding Burke, from whom he claimed to have derived title and possession, was dead. The court held him competent as to all matters, except such as transpired between himself and Burke: Eleventh ground of the motion for a new trial. In point of fact, he testified to many of these excepted matters, but to this, as the court certifies, there was no objection, so that we have only to determine whether he was wholly incompetent. The parties to the case on trial were both alive; Burke's administrator was not a party, nor could Burke's general estate be affected by the result. There is certainly no doubt of Rodahan's competency to prove his possession after the death of Burke, and the value of the premises thereafter for mesne profits: Code, sec. 3854; *Rose v. West*, 50 Ga. 480. And the general proposition that he could testify to any act or fact with which his deceased vendor had no connection is countenanced by several cases decided by this court.

Judgment reversed.

ESTOPPEL. — Where a deed recites that the grantor is seized of a particular estate which the deed purports to convey, and upon faith of which the bargain was made, he will be thereafter estopped to deny that such estate was passed to his vendee, although the deed contains no covenant of warranty at all; and such grantor is therefore estopped from setting up an after-acquired title to the estate thereby conveyed: *Reynolds v. Cook*, 83 Va. 817; 5 Am. St. Rep. 317, and note 323.

EVIDENCE — DECEASED PERSONS. — Conversations of a creditor with a debtor since deceased are admissible in an action by creditors against the heirs of the deceased, the witness, and other creditors: *Hutsler v. Phillips*, 26 S. C. 136; 4 Am. St. Rep. 687.

POWERS OF SALE. — The directions in a power of sale must be strictly pursued, and a deviation in the execution of the power will invalidate the sale: *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564; *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106. Where property is conveyed to the separate use of a *feme covert*, with power by her to revoke and appoint to new uses, a conveyance by herself and husband, though not referring to the power, passes the estate: *Coryell v. Dumton*, 7 Pa. St. 530; 49 Am. Dec. 489, and note 491.

HEAD v. GEORGIA PACIFIC RAILWAY COMPANY.

[79 GEORGIA, 358.]

CARRIER — PUNITIVE DAMAGES. — CARRIER IS ANSWERABLE FOR GENERAL OR PUNITIVE DAMAGES for wrongfully ejecting a passenger from its cars; and it is an error for the court to sustain a demurrer to that part of the complaint which sets up general and punitive damages.

DAMAGES. — WOUNDING A MAN'S FEELINGS is as much actual damages as breaking his limbs, though the jury has a much wider discretion in dealing with feelings than with external injuries.

A RAILWAY COMPANY HAS NO RIGHT TO EJECT A PASSENGER FROM ITS CARS BECAUSE HIS TICKET IS NOT STAMPED and his signature properly attested, where the omission to so stamp and attest is due to the failure of its ticket or other agents to comply with its own regulations. A company cannot urge the error of its agent as an excuse for disregarding its own ticket, nor as a ground for relief from damages, whether general or punitive, for ejecting a passenger from its cars.

ACTION to recover damages for being ejected from defendant's cars. Plaintiff had purchased a round-trip ticket at Tallapoosa, Georgia, to New Orleans, Louisiana, and return. Owing to a mistake in stamping and attesting his ticket, he was refused a return passage in its cars. He then procured from a friend a ticket, on which he returned to Birmingham, Alabama. Being still 150 miles from Tallapoosa, he was compelled to attempt to again ride on his own ticket; but the conductor refused to recognize it, and ejected him from the cars. The plaintiff was damaged by being delayed for two days two hundred dollars, for board and traveling expenses forty dollars. When he was refused passage, the cars were filled with other passengers, and plaintiff alleged that he was greatly troubled, and injured in his feelings. To the part of plaintiff's complaint seeking to recover general and punitive damages, the defendant demurred. To avoid such demurrer, the plaintiff proposed to insert in his complaint the following amendment: "Said ticket was signed and stamped by said Howell, and was a proper and legal ticket; but the agents and servants of said defendant company claimed that there was some irregularity in the signing and stamping, and for that reason refused to allow plaintiff to ride upon the same, and threatened to eject him from their cars on his return home to Tallapoosa from New Orleans, and actually did eject him from their said train, plaintiff then and there alleging that it was a proper and legal ticket." Leave to insert the proposed amendment was denied, and the demurrer to plaintiff's complaint sustained. The court, by its charge,

limited the plaintiff's recovery to his actual damages, seven dollars.

Head and Thomas, M. J. Head, and Blance and Noyes, for the plaintiff in error.

J. M. McBride, for the defendant in error.

BLECKLEY, C. J. The amendment proposed did not substantially strengthen the case set out in the original declaration, and while it was not an improper amendment, the court, perhaps, ought not to be reversed for disallowing it. But we think it was error to cut off the plaintiff from the recovery of such damages of every kind as he sustained. His declaration was not in contract, but in tort; it was an action upon the case for a wrong, not an action of *assumpsit* for the breach of a contract. It went upon the theory that the contract established the relation of carrier and passenger, a relation attended with a duty from the former to the latter, and that the duty was wrongfully violated. Where the plaintiff has a contract with the defendant which generates a relation attended with a public duty, he has his option to bring *assumpsit* for breach of the contract, or case for breach of the duty. Here the plaintiff brought a proper action, the contract being set out merely as inducement, with a view to raise the relation, the stress of the action being put upon his expulsion from the train, which, if wrongful, was not only a breach of the contract, but a violation of a public duty by a common carrier. The court erred in sustaining the demurrer, and ordering the action to proceed for the recovery of actual damages only,—actual damages in the sense in which the phrase has now come to be used frequently in Georgia, a sense supposed to exclude damages for wounded feelings, though sections 3066 and 3067 of the code, properly construed, do not require so restricted an interpretation. Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is, that one is internal and the other external; one mental, the other physical; in either case, the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last the amount is indefinite. The jury would have a much wider discretion in dealing with feelings than with an external injury. At common law, compensatory damages include, upon principle, and I think upon authority, *salve* for wounded feelings; and our code has no purpose to

deny such damages where the common law allowed them. And suppose we call the damages punitive, they are recoverable in such a tort as this, if the circumstances were aggravated, either in the act or the intention: *Georgia R. R. v. Olds*, 77 Ga. 674. Putting a man off a train wrongfully is a high-handed measure. In the court below, by sustaining the demurrer, it was meant to exclude recovery for everything except special damages,—damages that could be accurately proved and estimated. And the way the jury measured damages so as to get seven dollars under the evidence was, they allowed two dollars a day for the lost time, making four dollars, and three dollars for railroad fare, which the plaintiff paid to get back to Tallapoosa; so the jury found only special damage, the damage actually proved in a special case: they found no general damages at all.

Looking into the evidence, we find that this passenger purchased a ticket at Tallapoosa, which was to this effect: Special contract. Good for one first-class passage to New Orleans and return, when officially stamped and dated on back hereof, and presented with coupons attached. In consideration of reduced rate, the passenger agrees: 1. Company not responsible beyond its own line, only agent for other lines; 2. Ticket not transferable; 3. Any alteration of the ticket renders it void; 4. Ticket not good for outward passage, except within ten days from date of sale as stamped on back and written below; 5. Not good for return passage, unless holder identifies himself as original purchaser to satisfaction of authorized agent of Queen and Crescent Route at New Orleans within ten days from date of sale; and when officially signed and dated in ink and duly stamped by said agent, then good only within ten days from such date (which date perhaps means the date of stamping, but at all events, in this case the date of return was within ten days of the date of issuance); 6. Limited liability for baggage; 7. Coupons not receivable if detached; 8. The passenger's signature to be manuscript and in ink; 9. Ticket void unless all the conditions complied with; 10. No line to be answerable for damages for any statement in accordance with the contract made by any employee of said line. I conjecture there was an omission of the word "not,"—"any statement not in accordance with the contract," etc. Some question might arise as to inconsistent statement, but where consistent, it looks as if it would be idle to protect the company against it. 11. That no agent or employee has power to alter or

modify any of the conditions; 12. The passenger to sign his name and otherwise identify himself whenever called upon to do so by the conductor or agent of the line or lines, failure to do which renders the ticket void. These are the twelve conditions that the passenger subscribes to and agrees to be bound by. The declaration alleges that he performed them all on his part, and he so testifies in his evidence. Then the ticket is dated, signed by the passenger and by an attesting witness, and signed by the general freight and passenger agent. On the reverse side is the following: "Agent of Georgia Pacific Railway Company will stamp in space below on the left of the page. Agent of Queen and Crescent Route will stamp in space below on the right of the page." And there is a scroll on each margin for the stamp. "In compliance with my contract with the Georgia Pacific Railway Company and lines over which this ticket reads, I hereby subscribe my name as the original purchaser of this ticket"; signed by the passenger, and attested officially by the agent who sold the ticket, and dated on the day of sale; stamped on the right margin instead of the left.

There appears, in the execution of this ticket, to be two irregularities: 1. The stamp is on the wrong margin; and 2. One signature of the passenger is made at the wrong place. He signed twice when he bought the ticket,—once in the right place for the selling station, and then again at the place where he should have signed in New Orleans this signature that should have been made at New Orleans was made at the time and place of sale, Tallapoosa, and was attested by the very agent who sold the ticket, and dated there by him, apparently.

The passenger testified that at New Orleans he went to the proper agent to have the ticket stamped and signed in accordance with the contract; that he identified himself; that he urged upon the agent to recognize him and to recognize the ticket; that the agent declined to do it, but referred him to another officer, which officer stated that he sometimes for ladies had done such a thing, but he was not going to do it any more, so he declined. The effort—a persistent effort—made in New Orleans to have this contract complied with on the part of the designated agent failed. The passenger got upon the train to return, and they threatened him with expulsion, but he procured a ticket from a friend that brought him regularly as far as Meridian, Mississippi. There his new ticket exhausted itself, and he passed on to Birmingham with-

out question. In going from Meridian to Birmingham he had no trouble. When he reached Birmingham, he was then again at the line of the company that sold him the ticket, and he got upon its train, and when about two miles out, he offered it to the conductor to pay his fare; the conductor examined it and refused to recognize it, and expelled him from the train. Such is the evidence. He took measures then to get home. He seems to have done all that his contract required of him, and failure in correctness was on the part of this company's agent in the first instance, and of the agent designated by this company to act for it in New Orleans in the next instance. So we think that the plaintiff could recover in this action his proper damages of all sorts. Why not? The only excuse that can be rendered is, that the company's business was managed by itself (because management by its agents is management by itself) in a way that it would not recognize its own ticket. The company was as much represented by the agent who sold the ticket as if it had been a natural person who in person had represented himself. And so of the agent in New Orleans. It was as much represented by the conductor who rejected the ticket and expelled this man from the train as if it had been a natural person and had been there present and had in person ejected him. Then where is the difficulty in holding it liable? It is very proper to have rules and regulations amongst agents and employees by which they can conduct business orderly and correctly, but failure to do it correctly, intelligibly, and conformably to instructions is as much the fault of the company as it is the fault of the agent. The company can no more be heard to say that an error was committed by its agent, resulting in a breach of duty on its part to the plaintiff, than it can be heard to say that an error was committed by its own action. The agent's action is as binding upon it, within his sphere of power and duty, as is the action of the president or the board of directors within theirs. This agent that stamped the ticket wrong and attested a signature by the passenger out of time and place was acting in the line of his duty, and the plaintiff testifies that he believed in good faith that he understood his duty, and that he signed the ticket exactly where the agent pointed out for him to sign. He had a right to assume that all these agents understood their duties, and would perform them; and if he performed his, he could stand upon his contract, and upon his relation as passenger which the contract generated.

Now, if he had omitted his duty, as was the case with the party in *Moses v. East Tennessee etc. R. R.*, 73 Ga. 356, where the passenger failed to go and get his ticket stamped, he would have had no case. There the passenger had no right to a return carriage,—he was in default; but here this plaintiff has done his duty, his whole duty, and that being so, he is in the same attitude as a passenger where no mistake or irregularity has been committed. Whether we take the declaration or the evidence, or both, there ought to have been a recovery by the plaintiff for all sorts of damage that he sustained,—all sorts that the jury thought proper to award.

Judgment reversed.

CARRIERS — EXEMPLARY DAMAGES: See *Stute v. Chicago etc. R'y Co.*, 73 Wm. 147; 9 Am. St. Rep. 769, and note 777; *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; *ante*, p. 58, and note.

THARP v. YARBROUGH.

[79 GEORGIA, 282.]

DEED TO THE HEIRS OF A, he then having children living, vests an estate in them to the exclusion of his children subsequently born.

L. D. Moore, and W. S. Wallace and Son, for plaintiffs in error.

Gustin and Hall, and R. D. Smith, for the defendants in error.

LUMPKIN, J. The only question presented for adjudication in this case is, whether or not the court below properly construed a certain deed.

The deed begins: "This indenture . . . between Cicero A. Tharp . . . of the one part, and the heirs of Robert A. Tharp . . . of the other part, witnesseth," etc. It conveys the land in controversy to "the heirs of Robert A. Tharp, their heirs and assigns," in consideration of love and affection and the sum of five dollars. At the time the deed was made, Robert A. Tharp had three children living. Several others were born afterwards. It is conceded that if the deed passed the title to the three children first mentioned only, and that those subsequently born took no interest thereunder, the plaintiffs in the court below could not recover, and that the verdict for defendants was right. The court held that the words "heirs of Robert A. Tharp" meant his children, and included only those in life when the deed was executed.

There seems to be no difficulty in reaching the conclusion that the word "heirs" in this deed did mean "children"; but did it mean only the three then in existence? or will it extend to those who were born afterwards? We think the judge below ruled correctly. Every deed must have parties. This deed expressly defines who are the parties to it, viz.: Cicero A. Tharp of the one part, and the heirs of Robert A. Tharp of the other part. A deed must not only have parties to it, but they must necessarily be in existence at the time of its execution, unless, by its own terms, it provides a beneficial interest for parties yet to be born. If Mr. Tharp had conveyed to the heirs, or to the children, of his brother, now born, or who may hereafter be born, it would seem clear the latter would take an interest under the conveyance when they came into life, but he did not so convey.

It is insisted that by the use of the word "heirs" the donor intended to fix, as the class of persons who should take this land, those who would be the heirs at law of Robert A. Tharp after his death, and that accordingly his death must be waited for to ascertain precisely to whom the title did pass. At the same time, it is also contended that the word "heirs" means the "children" of Robert A. The donor could not have used the word in two senses. He had in his mind the objects of his affection and his bounty,—the three children of his brother then *in esse*,—and it is not likely that he meant to give his property to the heirs at law of his brother without regard to who they might be, possibly persons not even related by blood to himself. He must have used the word "heirs" in the sense of "children," and in that sense it could apply only to children then living. Surely the donor did not intend to keep the title to this property *in nubibus* till his brother's death. He desired it to vest immediately, and this could only be accomplished by giving the deed the construction herein indicated.

The case in 33 Ga. 454, relied on by the ingenious counsel who appeared for plaintiffs in error, differs from the case at bar in two essential respects: 1. The testator there provided a trustee, to whom the title passed under the will, and it was made the duty of this trustee to hold the property for the benefit of the *cestuis que trust*; 2. The will gave the property in trust for the benefit of the heirs in law of John P. Vinson, and, as Chief Justice Lumpkin observes, "By giving the property to the heirs in law of John P. Vinson [testator's son], it shows that the testator looked to the death of his son as fixing the

period when the legatees should be ascertained." Mr. Tharp's deed does not convey to the heirs at law, but to the heirs of his brother. It is also true that more liberal construction should be given to wills in favor of persons not born than to deeds, which are contracts between the parties. In addition to what has been already said, the policy of our law favors the vesting of estates, and this is another reason for upholding the construction given to the deed in this case.

Judgment affirmed.

HEIRS. — A devise to "children" of testator's son comprehends only the children living at the testator's death: *Shotts v. Poe*, 47 Md. 513; 28 Am. Rep. 485; and see note to *Lipman's Appeal*, 72 Am. Dec. 692; *Thompson v. Garwood*, 3 Whart. 287; 31 Am. Dec. 502; *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277; *Hubbard v. Lloyd*, 6 Cush. 522; 53 Am. Dec. 55; *Collins v. Collins*, 1 Barb. Ch. 630; 45 Am. Dec. 420, and note.

CLEMENTS v. TILLMAN.

[79 GEORGIA, 481.]

ENFORCEMENT OF A DECREE FOR A SPECIFIC SUM OF MONEY CANNOT BE BY PROCESS OF CONTEMPT, but only by execution against property as at law. It is therefore an error to add to a decree for the payment of money a clause that in default of payment, "the defendant be held and deemed to be in contempt of the order and decree of this court."

SUIT in equity by Hattie E. Tillman, legatee, under the will of Jacob A. Clements, against John W. Clements, executor, and Sarah B. Clements, executrix, of such will, for account and settlement. The jury returned a verdict that John W. Clements, as executor, had in his hands, belonging to Hattie E. Tillman, as such legatee, the sum of \$810 principal, and \$500 interest. Upon this verdict the court entered the following decree: "Whereupon, the premises considered, it is ordered, adjudged, and decreed by the court, that the complainant do recover the sum of \$810 principal, and the further sum of \$500 interest to this date, and the further sum of \$—— cost of suit in this behalf laid out and expended, for which said several sums let execution issue, to be levied in the first place of the goods and chattels, lands and tenements, of said Jacob A. Clements, deceased, in the hands of John W. Clements, executor of the will of said Jacob A. Clements, if to be found, and if not to be found, then to be levied of the personal goods and chattels, lands and tenements, of said John W. Clements. It is

further ordered and decreed by said court, that the said John W. Clements do satisfy and pay the aforesaid amounts, principal, interest, and costs, to the said complainant on or before the first day of January next, and in default thereof, that he be held and deemed to be in contempt of the order and decree of this court." The plaintiff in error excepted to the portion of the decree contained in the last sentence upon the ground that a decree for the payment of a specific sum of money could not be enforced otherwise than by execution against property.

C. J. Thornton, for the plaintiff in error.

L. F. Garrard, for the defendants in error.

KIBBEE, J. Originally, in the absence of statutes providing otherwise, decrees of courts of equity, of whatever kind or nature, operated strictly and exclusively *in personam*. The only remedy for their enforcement was by what is termed process of contempt, under which the party failing to obey them was arrested and imprisoned until he yielded obedience, or purged the contempt by showing that disobedience was not willful, but the result of inability not produced by his own fault or contumacy. The writ of assistance to deliver possession, and even the sequestration to compel the performance of a decree, are comparatively of recent origin.

Our statutes expressly provide that "all orders and decrees of the court may be enforced by attachment against the person; decrees for money may be enforced by execution against the property": Code, sec. 3099. "A decree in favor of any party for a specific sum of money, or for regular installments of money, shall be enforced by execution against property as at law": Id., sec. 4215. "Every decree or order of a court of equity may be enforced by attachment against the person for contempt, and if a decree be partly for money and partly for the performance of a duty, the former may be enforced by execution, and the latter by attachment or other process": Id., sec. 4216.

The clear legislative intent is manifest, to enlarge and render more efficacious equitable remedies, while preserving the remedies the courts had previously employed in the absence of statutes providing others. Under our statutes, when a party is decreed to perform a duty or to do any act other than the mere payment of money, which the court has jurisdiction to adjudge he shall do, if he disobeys, the authority of the court is defied; he is guilty of contempt, and the arrest and im-

prisonment of his person is not imprisonment for debt in any appropriate sense of the term. But if a court of equity should render a simple decree for money, on a simple money verdict, — a decree which it may now enforce by the ordinary common-law process against property, the failure to pay the decree would not be a contempt, nor could compulsory process against the person of the party in default be resorted to to enforce payment.

In *Coughlin v. Ehlert*, 39 Mo. 285, the court uses the following language: "We do not mean to say that a party may not be put in contempt for disobeying a decree for the performance of acts which are within his power, and which the court may properly order to be done. If it were shown, for instance, that the party had in his possession a certain specific sum of money, or other thing, which he refused to deliver up under the order of the court for any purpose, it may very well be that his disobedience would be a contempt for which he might lawfully be imprisoned." In *Carlton v. Carlton*, 44 Ga. 220, Judge McCay, delivering the opinion, says: "We do not intend to say, that simply because a debt is adjudged by a decree in chancery, instead of by a judgment at law, it may therefore be enforced by imprisonment. The imprisonment must be clearly for the contempt of the process of the court, and be of one who is able and unwilling to obey the order of the court. . . . It ought never to be resorted to except as a penal process, founded on the unwillingness of the party to obey. The moment it appears that there is inability, it would clearly be the duty of the judge to discharge the party," etc. The court further held, that "ordinarily it would be improper to include in the order the alternative order for imprisonment on failure, since it is not to be presumed that a contempt will ensue."

The constitutional provision, "there shall be no imprisonment for debt," was not intended to interfere with the traditional power of chancery courts to punish for contempt all refusals to obey their lawful decrees and orders. This proposition may be conceded to be sound without affecting the case at bar in any respect. "The power in question was never exercised by chancery courts, except in those cases where a trust in the property or fund arose between the parties litigant, or some specific interest in it was claimed, or the chattel had some peculiar value and importance, that a recovery of damages at law for its detention or conversion was inadequate.

Such interference was in the nature of a bill *quia timet*, and was asserted only on a proper showing that the fund or property was in danger of loss or destruction": 1 Story's Eq. Jur., secs. 708-710. "No jurisdiction to compel the payment of an ordinary money demand, unconnected with such peculiar equities, ever existed in chancery courts; nor had they the power to compel such payment by punishing the refusal to pay under the guise of contempt."

In the case at bar, the decree was right in awarding an execution against the executor as set forth in said decree; but the facts did not authorize an alternative order imprisoning the defendant on failure to pay.

Judgment reversed.

CONTEMPT — FAILURE TO PAY MONEY ON ORDER OF COURT. — Where a husband who lived separately from his wife, and had been adjudged by the court to pay a certain monthly alimony, was unable to pay the money, and had not voluntarily made himself unable to pay, he was not guilty of contempt: *Galland v. Galland*, 44 Cal. 475; 13 Am. Rep. 167; compare *Ex parte Wilson*, 73 Cal. 97.

GEORGIA RAILROAD AND BANKING COMPANY v. FRIDDELL.

[79 GEORGIA, 483.]

RAILWAY COMPANIES' RIGHT TO COMMON USE OF TERMINAL TRACKS. —

Where the lines of two railways terminate at the same town or city, they may use the same track within such town or city, and when they do so, the track so used becomes, for the time being, the track of the company so using it, and the owner of such track is not answerable to one of its employees for injuries resulting from the negligence of employees of the other road while running its train upon such track.

RAILWAY COMPANY IS NOT ANSWERABLE FOR INJURIES SUFFERED BY ONE OF ITS EMPLOYEES FROM THE NEGLIGENCE OF THE EMPLOYEES OF ANOTHER RAILWAY while running over the track of the former, where such track was at a terminal point common to both companies, and both had therefore a right to its use.

J. B. Cumming, Hillyer and Brother, A. H. Cox, and Henry Jackson, for the plaintiff in error.

Hulsey and Bateman, for the defendant in error.

BLECKLEY, C. J. Friddell was an employee of the Georgia railroad company as a switchman, his business being to change the switches in the city, and give signals to moving engines and trains on the Georgia railroad. While so engaged,

and we may assume under the evidence, without any fault on his part, he sustained a personal injury on account of the negligence of the employees of the Richmond and Danville Railroad Company, they being in the exercise of the chartered rights of the Atlanta and Charlotte Air-line Railway Company, or perhaps the Richmond and Atlanta Air-line Railway Company. At all events, they had chartered rights to enter the city, and this was the common terminus of the two companies. Their track for some distance ran parallel to the Georgia railroad, and upon it was situated a cotton compress, and on the Georgia railroad, or rather on one of its side-tracks, there was another. By some arrangement between the two companies, there was a mutual interchange of tracks for the purpose of reaching these compresses and procuring freights from them, loading and unloading, etc. On this occasion, the Richmond and Danville train had gone on the Georgia railroad siding to receive cotton from the compress located on that siding; and coming up on the main line of the Georgia railroad, after transacting its business at the compress, the employees, by their negligence, injured Friddell, who was attending to his duties in connection with a locomotive, and perhaps a train in sight, belonging to the Georgia railroad company, his employer. He brought an action against his own company for the injury which the other company had inflicted, and the theory of his action is, that his company, being the proprietor of the track over which the other company was running its trains when the injury occurred, is liable to him for the negligence of the employees of the other company when using that track just as it would be for the negligence of its own employees. He recovered a verdict, and a motion for a new trial made by the Georgia Railroad Company was denied. Under that motion, the question arises whether Friddell has redress against his own company for this injury. It is contended, on the authority of certain cases, and on general principles, that the Richmond and Danville company, not having a contract with the Georgia Railroad Company for the use of its track, had no right to be there in such a way as to exempt the Georgia Railroad Company from liability for its negligence. The court below seemed to concede that if there had been a contract by which the Richmond and Danville company had a right to use the Georgia railroad track, the matter would have been upon a different footing; but the mere arrangement by way of interchange of use, the court

seems not to have recognized as a contract, or as equivalent thereto; or if the court did so, the jury, under the charge of the court, did not.

We think it makes no difference whether there was a contract or not. If each of these companies had a chartered right to come to the city of Atlanta, as each of them had, they could use a common track at a terminal point belonging to them jointly, or tracks in common belonging to them severally; and in the use of either, each company would be upon its own franchise. It would not be exercising the franchise of the other company. That is the distinction. And hence the verdict in this case was wrong. There could be much said in favor of several companies having the privilege, which we think they have, to use the same track in common in a city; and we know of nothing that would subject one company to its employees (though to passengers the rule of liability would be different) for the negligence of employees of another company. The risk of service covers this. And the employee is not without redress. He cannot sue his own master, but he can sue the other company, the one whose employees were in fault, and recover against it; and we think that is the redress proper for such an injury. So we rule as set out in the head-notes, and rest the case upon what we think is the clear principle applicable to the facts. Where numerous railways connect in the same city, the city is a common station for all, and interchange in the use of tracks is a needful practice for the accommodation of traffic. It promotes the common interest of the companies, and the interest of the public, and employees who are unwilling to expose themselves to the risks of so reasonable a method of business are not abreast with the exigencies of railway service.

The court erred in not granting a new trial.

Judgment reversed.

RAILROAD TRACK USED BY TWO COMPANIES. — LIABILITY OF THE RESPECTIVE COMPANIES: Compare *Killian v. Augusta etc. R'y Co.*, 79 Ga. 234, *ante*, p. 410.

CAUSEY v. STATE.

[79 GEORGIA, 564.]

LARCENY. — TAKING PROPERTY UNDER A FAIR CLAIM OF RIGHT is not larceny, and the publicity of the taking is very powerful evidence of the good faith of the claim.

Steed and Wimberly, for the plaintiff in error.

J. L. Hardeman, solicitor-general, for the state.

BLECKLEY, C. J. Causey was tried for stealing a bell. He had been driving a milk-wagon for Mr. Gunn, in the city of Macon, and had bought a bell to be used in warning or attracting customers, and upon being discharged by Mr. Gunn, had left his bell. He found other employment, and Mr. Gunn engaged a successor to him in driving the milk-wagon, and the bell was turned over to his successor, who used it for some time. On one occasion he left his wagon in a public street in Macon, and Causey went to the wagon to get his bell. Not finding the driver there, he took up the bell, and rang it loudly for some time, perhaps a minute. No one came, and Causey turned to a by-stander whom he knew (there were several persons present), and requested him to tell the driver when he came that he had taken his bell. The message was not delivered, because the person to whom it was committed failed to remember it; and the new driver prosecuted Causey for stealing the bell. He was tried in the city court without a jury; the judge found him guilty, and sentenced him to a punishment for the offense as a misdemeanor. He made a motion for a new trial, on the ground that the conviction was contrary to law, and without sufficient evidence; and the motion was denied.

In the argument of the case here, the solicitor-general, representing the state, conceded that a new trial ought to be granted; and we agree with him that, taking all the facts and circumstances together, there is a fair presumption that Causey acted under a *bona fide* claim of right.

The evidence was pretty decided that he had left the bell as the property of Mr. Gunn, his employer, and that Mr. Gunn had accounted to him for the purchase of the bell in settling their accounts for milk-money. The real question was, whether that accounting took place. Causey, at the trial, had a book, kept in his way, in which he stated he entered his receipts and payments; and he submitted that book. It seems not to

have been very intelligible, and doubtless it was his unfortunate manner of keeping books that disabled him from replying to this evidence. It was very likely that the witness, Mr. Gunn, thought that the bell had been accounted for, and indeed, if he was a truthful man, he did (and we assume that he was); but he was probably mistaken, and the circumstances under which the bell was taken tend very strongly to show that he was mistaken, and this book, if it could have been made available to this man, would have indicated the good faith of his claim of right. The authorities are abundant that when one takes property under a fair claim of right it is not larceny; and the publicity of the taking is very powerful evidence to establish the *bona fides* of the claim of right. There could hardly have been greater publicity, because this was done in an open street, near the heart of the city, as we would infer from the evidence; and the ringing of the bell was loud enough to be heard in adjacent streets, so the witnesses testified. It seems he made a sort of bell-ringing proclamation that he was about to resume his ancient possession, and seemed to desire it to be known and observed of all men; and that is a very strong circumstance in favor of the man's innocence. In addition to this, he proved a good character for honesty and integrity. He appears, from this record, to be a man of excellent standing for a colored man, and it is very probable that he is innocent of the crime of larceny; and we reverse the judgment, and direct that the case be tried again.

As to claim of right, see 1 Hale P. C. 509; 2 Russell on Crimes, 163; 2 Archbold's Crim. Pl. & Pr. 1183; 1 Wharton's Crim. Law, 884; 1 Bishop's Crim. Law, secs. 884, 297; 2 Id., sec. 851.

As to open taking, see 1 Hale P. C. 509; 2 Russell on Crimes, 158; 2 East P. C. 661; 2 Bishop's Crim. Law, sec. 842, note 1; 2 Archbold's Crim. Pl. & Pr. 1183, note 1.

Judgment reversed.

LARCENY — WHAT IS NOT. — A strong presumption arises, on prosecution for larceny, that there was no felonious intent, if the taking was open and notorious, and there was no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking: *Black v. State*, 83 Ala. 81; 3 Am. St. Rep. 691, and note 693.

COLEMAN v. ALLEN.

[79 GEORGIA, 637.]

TO SUSTAIN ACTION FOR MALICIOUS PROSECUTION, there must be a concurrence of malice and want of probable cause.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — The provision of the code of Georgia declaring that "want of probable cause shall be a question for the jury, under the direction of the court, and shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused," does not limit want of probable cause to cases where the accuser had no ground for proceeding but the desire to injure the accused. The accuser may still be guilty of proceeding without proper cause, though his motive is wholly free from any independent wish to injure the accused.

MALICIOUS PROSECUTION — INSTRUCTION. — It is an error to instruct the jury, in determining whether the defendant had acted without probable cause, to consider whether he acted "as you would act under the same circumstances."

MALICIOUS PROSECUTION. — THAT THE MOTIVE OF THE PROSECUTOR was to make an example of the accused; and thereby to deter others from committing crime, does not render the former guilty of malicious prosecution, if he had reasonable cause to believe the latter to be guilty of the crime charged.

CRIMINAL LAW. — MORTGAGOR MAY BE GUILTY OF A FRAUDULENT DISPOSITION of the mortgaged property, and of occasioning loss to the mortgagee, under section 4600 of the code of Georgia, though he has other property from which the mortgagee could have collected the debt secured by his mortgage. The mortgagee is entitled to be satisfied out of the specific property, and the mortgagor has no right to throw his secured creditor on his general estate.

CRIMINAL LAW. — THE REFUSAL OF THE MORTGAGOR TO PRODUCE OR POINT OUT THE MORTGAGED PROPERTY to an officer who is seeking to levy thereon to satisfy the mortgage is not a criminal offense, but it may be a strong circumstance to indicate fraud.

INSTRUCTION IN AN ACTION FOR MALICIOUS PROSECUTION, that "in cases of this character, the injury, if any is proved to your satisfaction, is to the peace, happiness, etc., of the plaintiff; no measure of damages can be prescribed except the enlightened conscience of impartial jurors," is correct, if confined to that part of the case wherein there can be no exact measure of damages, but it should be so limited that the jury will not apply it to that part of the case where the exact amount of damages has been proved, such as expenses in counsel fees, loss of time, and the like.

MALICIOUS PROSECUTION — ELEMENTS OF DAMAGES. — The pecuniary circumstances of the defendant may be considered by the jury in an action of malicious prosecution under the code of Georgia, which declares that "the injury shall not be confined to actual damages sustained by the accused."

ACTION for malicious prosecution.

Lefton and Moore, and Bacon and Rutherford, for the plaintiff in error.

Dessau and Bartlett, for the defendant in error.

BLECKLEY, C. J. Allen mortgaged to Coleman and Newsom a mule and a one-horse wagon. Newsom died, and Coleman, as surviving partner, foreclosed the mortgage. A mortgage *fi. fa.* was issued; search was made for the property, and it was not found. Certain information came to Coleman indicating that the property had been disposed of by Allen. Coleman took the advice of counsel learned in the law, and thereupon made the requisite affidavit to impute an offense under section 4600 of the code, charging that the property had been fraudulently disposed of, procured a warrant for the arrest of Allen, and Allen was arrested, detained in custody upon the streets of Macon a few hours, and was then permitted to go home, on his promise made to the sheriff to return and give bond. Afterwards he returned and gave a bond for his appearance to answer the charge. At a subsequent term of the city court of Macon, another affidavit was made by Coleman, charging that the property had been fraudulently sold and disposed of. Upon that affidavit an accusation was framed, and Allen was tried and acquitted; after which he brought his action against Coleman for malicious arrest and malicious prosecution, founding his action upon both proceedings, that is, the warrant, his arrest under it, and the subsequent prosecution in the city court. He laid damages in his declaration, generally, at a large sum; and alleged special damage in that he was put to expense in defending himself, and that he lost time, etc. On the trial he proved these special damages. The jury found for the plaintiff a verdict for one thousand dollars. The defendant moved for a new trial, on various grounds, which motion was denied. It is the judgment refusing the new trial that we have now to review.

1. The general principle that, in an action for malicious prosecution, there can be no recovery without a concurrence of the want of probable cause with malice, is fully recognized. If probable cause and malice are both present, there can be no recovery; if they are both absent, there can be none. In this class of actions, it is only where malice is present and probable cause is absent that there can be a recovery.

The seventh ground of the motion for a new trial complains of the charge of the court as follows: "Probable cause means nothing more than reasonable grounds. Probable cause is that apparent state of facts which seems to exist after reasonable and proper inquiry." The eighth ground complains that the court charged: "Now, whilst no man should be deterred

from prosecuting a case on the criminal side of the court, where he honestly believes, after due and proper inquiry, — either upon his own knowledge, or upon reliable information furnished by others, — that a crime has been committed, yet he must not act hastily, or without ordinary caution or reasonable diligence in instituting a prosecution, and if he so acted without reasonable diligence, and hastily and unreasonably, he is responsible for damages." The ninth ground complains that the court charged: "See whether the defendant acted on probable cause and without malice or not; in other words, find out what his diligence was as to this matter. Take it all into consideration, and see whether he acted with ordinary care, and as a man of ordinary prudence would act under the same circumstances, or as you would act under the same circumstances."

Leaving out the last member of the last sentence, "or as you would act under the same circumstances," the main objection urged against the charge, as it respects probable cause, is, that it conflicts with section 2983 of the code, which section reads thus: "Want of probable cause shall be a question for the jury, under the direction of the court, and shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused." It is contended that this is exhaustive of all possible cases of the absence of probable cause; that unless a reasonable man would not be satisfied by the circumstances that the accuser had no ground for proceeding but his desire to injure the accused, there would be the presence of probable cause. We think this construction a mistaken one. The section declares that the question shall be one for the jury, under the direction of the court; but it does not leave the whole range of the question to the jury. It undertakes to settle an instance in which the court and jury shall recognize the absence of probable cause. That instance is, when the circumstances are such that the prosecution must be attributed solely to a desire to injure the accused. Of course, want of probable cause exists when there is no ground but the desire to injure. That is the extreme case of legal malice. But it does not follow that if a man has no ground but the desire to benefit his grandmother, probable cause might not be absent in that instance. The absence of probable cause is to be found in every case where there is no inducement for the prosecution except the desire to injure the accused. But it

does not follow that this is exhaustive of all the instances of the want of probable cause; for the desire that actuates the accuser may be one of selfish or benevolent affection, may be one of self-love or love for another, and wholly free from any independent wish to injure the accused, yet there may be absence of probable cause, and presence of legal malice. The phraseology of the code was doubtless taken from an observation of Chief Justice Tindal in *Willans v. Taylor*, 6 Bing. 90, in which it was said: "What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused." Some of the language I have quoted from the motion for a new trial may not be literally accurate, but construed in the light of the whole charge, there is no substantial error in it. It deals rather with what is probable cause than what is not; and of course the affirmative of the matter is open to consideration if the negative is. If it is proper for the jury to inquire what is not probable cause, in conducting that inquiry, it must be proper for them to consider what is probable cause.

The view of the judge below corresponds substantially with that embraced in the authorities which treat of probable cause: See 2 Wood's *Addison on Torts*, sec. 853, and notes; 2 Sutherland on *Damages*, 707; 1 Hilliard on *Torts*, 429 et seq.; *Bacon v. Towne*, 4 Cush. 238, 239; *Griffis v. Sellars*, 2 Dev. & B. 492; 31 Am. Dec. 422. Cases recognizing the duty of caution, avoidance of haste, etc., are *McGum v. Brackett*, 33 Me. 331; *Long v. Rodgers*, 19 Ala. 336; *Shafer v. Loucks*, 63 Barb. 426; *Humphries v. Parker*, 52 Me. 505, and many others.

But the latter part of the charge cannot be upheld, — that part which refers to the jury, and makes them the standard of propriety. That much was error, and for that error we shall reverse the judgment of the court.

2. Before passing from the subject, however, I wish to observe that the doctrine pressed upon us in the argument, and sustained by the opinion of two members of the court of exchequer in the case of *Stevens v. Railway Co. and Lander*, 10 Ex. 352, we are unwilling to recognize as applicable to this case. It might have been properly applied to the case which was before the court at that time, because there were circumstances indicating that the charge had been trumped up, but we see

nothing in this case that so indicates. The doctrine announced by Alderson, Baron, was this: "Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive on the part of the person who acts in that way. And it appears to me, in the present case, that the prosecution of a person for the purpose of frightening others, and thereby deterring them from committing depredations upon the property of the company, is not a motive of such a direct character as to afford a legitimate foundation for a criminal prosecution." And Martin, Baron, in the same case, said: "I think that the fact of the defendant Lander prosecuting the plaintiff, not for the purpose of punishing him, but to make an example to others, is ample evidence of malice." In so far as any general test of the right purpose of instituting a prosecution is here hinted at, it seems at variance with sound principle. The most elevated motive that can possibly be entertained for prosecuting anybody is to make an example for the benefit of the public; the next is to make an example for the benefit of individuals other than self; and the next is to make an example for the benefit of one's self. The bringing of anybody to justice, without regard to its effect for good by way of example, is excusable, but not commendable. The motive of the prosecution testified to in this case was a proper one, being the desire to deter others from committing crime by making an example of the alleged criminal. But no one has a right to make any person an example, unless he is guilty; and it will not do to proceed against him for example or anything else, unless you believe him to be guilty, and have good and probable grounds upon which to base the opinion; but I cannot see anything to criticize in the motive of a prosecutor who candidly avows that he does not want to hurt the accused, but simply wants to make him an example to deter others. Such a mental attitude toward offenders is that of the law itself.

3. The sixth ground of the motion for a new trial embraces a charge of the court to this effect: "In determining whether the holder of the mortgage has sustained loss, the jury can take into consideration any facts going to show that the mortgagor had other property than the mortgage from which the mortgagee could have collected the debt secured by the mortgage. For instance, if the mortgagor was solvent, and had property subject to the mortgaged debt, then a sale or other disposition of the mortgaged property would not be a violation

of the law." We think this is a misconstruction of the statute: Code, sec. 4600. The loss mentioned in the statute does not necessarily refer to a loss of the debt, or any part of it; but if there be a fraudulent disposition of the property mortgaged, and loss of the mortgagee's security, or of the value of his security, results from it, the fraud is an offense; or if the mortgagee sustains loss by reason of having to incur expense to follow the property or discover it, in consequence of a fraudulent sale, or fraudulent disposition, we think such loss would be all the loss that the statute would require, in order to make the vendor punishable. The gist of the offense is the fraudulent sale or disposition of the property. All the acts and moral elements which have to come from the accused being complete, then any loss that results from those acts and moral elements will be sufficient to render the accused punishable under the statute.

There could be cases, and may be cases, in which such a disposition of the property would be followed by no loss at all to the mortgagee; if he could go and levy on the property with the same facility after it is sold or disposed of as before, there is no offense; he cannot complain; he is not hurt. But if he is put to more expense in collecting his debt, or in prosecuting his remedies, it is a loss to him by reason of the wrongful and fraudulent act, and the loss is to be imputed to the mortgagor. The case was put to us: Suppose that Vanderbilt had mortgaged property and fraudulently disposed of it, would it be any offense? I accept the supposed case. If Vanderbilt or anybody else were so to act, and thereby lessen the value of the security, he would be amenable to this law. The mortgagee is entitled to his satisfaction out of the specific property, and the mortgagor has no right to throw his secured creditor on his general estate; after the mortgagee has obtained a lien on the mortgaged property, he is entitled to have his satisfaction out of it; and if the mortgagor, by fraudulently disposing of it, causes loss in the value of the security, or by way of increased expenses in the matter of realizing satisfaction out of that property, Mr. Vanderbilt, just as Mr. Allen or anybody else that does the wrongful act, would be amenable to the law. It cannot be possible that if a poor fellow fraudulently runs off or conceals his mortgaged property, and has nothing to represent it, he is guilty, and the man who has something is not, though he has done the same act with the same intent. If they both act with the same intent, if the physical and

moral elements in each case are the same, and there is one dollar or one dime of loss to the creditor, they are equally amenable to the provisions of this statute. It will not do to say that a man, rich or poor, can mortgage property and dispose of it as he pleases for the purpose of defeating the application of it to the mortgage, that is, with a view and intention of defrauding his creditor, and then turn around to him and say: "Sue me. I have plenty left. Incur the expense and submit to the delay of bringing an action against me and realizing out of my general estate." Such insolent defiance, we apprehend, was never in the contemplation of the legislature. The statute does not say loss of the whole or a part of the debt, but it says "loss." The language (Code, sec. 4600) is: "If any person shall violate the provisions of this section, and loss is thereby sustained by the holder of the mortgage, the offender shall be deemed guilty of a misdemeanor," etc. So we think the charge of the court on this subject was another error committed in trying the case.

4. Another part of the charge embodied in the sixth ground of the motion is: "In Georgia, a mortgage is only a security for a debt, and passes no title. When the mortgage is foreclosed, and the *fi. fa.* placed in the hands of the levying officer, it is the duty of the officer to find and levy upon the property, and there is no obligation on the part of the mortgagor to produce the mortgaged property, or to point it out; and the failure of the mortgagor either to produce to the levying officer the property, or to point it out to the officer, will not be any offense." This charge is sound law. And yet, while no offense, it may be a very strong circumstance to indicate fraud, if the mortgagor will not assist the officer to find the property. It is not a crime for him to refuse to do it, but to produce the property is a very appropriate thing for him to do. To show the officer where the property is when he comes to make a levy is a moral duty. It is a higher style of conduct on the part of an honest debtor to do this than just to say: "Find it if you can." But it is no crime not to point it out.

5. Another part of the sixth ground of the motion for a new trial is an exception to the charge to this effect: "In cases of this character, the injury, if any is proved to your satisfaction, is to the peace, happiness, etc., of the plaintiff. No measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, if proved to your satisfaction, and all the attend-

ant facts proved before you, should be weighed": Code, sec. 3067.

The defendant submits that whether, "in cases of this character, the injury is to the peace, happiness, etc., of the plaintiff," is a question for the jury, and not for the judge to decide in his charge. The contention is, that for the judge to classify the case was error, because it was an encroachment upon the province of the jury. We do not so consider it. The judge did not say "in this case"; but he said "in cases of this character, the injury, if any," etc. In *Ransone v. Christian*, 49 Ga. 491, the charge was criticised upon the ground that the question was as to exemplary damages, and the judge said "in this case"; but here the judge says "in cases of this character." It was not improper to tell the jury that in cases of this character there was no exact measure of damages, if the court had not put the whole case upon that proposition. But there was error in not discriminating as to a part of the case. A part of the case was subject to this rule; but the court charged the jury, as to the whole case, that no measure of damages could be prescribed except the enlightened conscience of impartial jurors. There was a measure of damages as to a part of the case, because the plaintiff had proved his expenses in counsel fees, his loss of time, the value of his time, etc.; so that the error was in not distinguishing between the part of the case which was subject to the absolute, unlimited discretion of the jury, and the part which was confined by the evidence to sums actually proved: *Central Railroad v. Senn*, 73 Ga. 705.

6. The code, section 2986, declares: "The recovery shall not be confined to actual damages sustained by the accused, but shall be regulated by the circumstances of the case." That not only allows, but constrains, the jury to look beyond actual damages, and for this reason we uphold the ruling of the court admitting evidence as to the pecuniary circumstances of the defendant in the action. Such evidence, under many authorities, is admissible wherever punitive damages may be recovered; but what we rule at present is, that it is admissible in this class of actions, where the very essence of the injury is that it proceeded from malice. We think that, under all the authorities, the pecuniary condition and worldly circumstances of the defendant may be received in evidence, to be considered by the jury, in this particular class of actions; and the mere classification distinguishes it from the case of *Georgia Railroad v.*

Hemer, 73 Ga. 251. In that case there was no absolute statutory injunction to make the damages exceed mere compensatory damages.

Wealth of defendant considered: 1 *Sutherland on Damages*, 743-745; 3 *Id.* 727; *Belknap v. Railroad*, 49 N. H. 358; *Johnson v. Smith*, 64 Me. 553; *Humphries v. Parker*, 52 *Id.* 507, 508; *Stanwood v. Whitmore*, 63 *Id.* 209; *Jones v. Jones*, 71 *Id.* 562; *McCarthy v. Nisken*, 22 Minn. 90; *Winn v. Peckam*, 42 Wis. 493; *Birchard v. Booth*, 4 *Id.* 67; *Barnes v. Martin*, 15 *Id.* 240; 82 Am. Dec. 670; *Hunt v. R. R. Co.*, 26 Iowa, 363; *Guengeresh v. Smith*, 34 *Id.* 348; *Dailey v. Houston*, 58 Mo. 368; *McNamara v. King*, 7 *Id.* 432; *Clements v. Maloney*, 55 Mo. 352; *Rowe v. Moses*, 9 Rich. 423.

7. Some authorities hold (and section 3067 of our code may possibly bear that construction) that where the pecuniary circumstances of the defendant are admissible in evidence to be considered in graduating damages, those of the plaintiff are also admissible for the like purpose. This precise question need not be decided in the present case, as there was another object for which the plaintiff's pecuniary circumstances were clearly admissible, that is, to throw light upon his dealings with the mortgaged property and the motive that actuated the same. Whilst the wealth of Vanderbilt would not screen from punishment for a fraud actually committed, it might be of great consequence in illustrating the question whether or not a fraud was intended, and also the further question whether an accuser had reason to believe that a fraud was intended.

8. Another ground of the motion for a new trial objects to a certain question put to Mrs. Allen, with reference to whether her husband, on being arrested, was disturbed or troubled. The objection was to the question, not to the evidence that it elicited, and we find in looking at the brief of evidence that the answer was legal, and therefore the exception to the question is of no consequence.

Judgment reversed.

MALICIOUS PROSECUTION.—To sustain an action for a malicious prosecution which has terminated in an acquittal, it must be shown that the action was instituted both in malice and without probable cause: *Paddock v. Watts*, 116 *Ind.* 146; 9 Am. St. Rep. 832, and note 836; *Ward v. Sutor*, 70 Tex. 343; 8 Am. St. Rep. 606, and note; *Clements v. Odorless Excavating App. Co.*, 67 Md. 461; 1 Am. St. Rep. 409, and note 412; *Dearmond v. St. Amant*, 40 La. Ann. 374. And the termination of the prosecution alleged to have been malicious must also be shown: *Forster v. Orr*, 17 Or. 447.

PHILLIPS v. DEWALD.

[79 GEORGIA, 782.]

CARE IN SECURING A HORSE AND PREVENTING HIS ESCAPE WHICH HIS OWNER IS BOUND TO OBSERVE is that care which every prudent man would exercise in dealing with similar horses at a like place and under like circumstances. Though a horse be sensible, gentle, and accustomed to stand at his owner's door in a busy, noisy street, yet if he be fancy, stylish, restless, and high-strung, the jury may infer negligence from leaving him loose elsewhere in the same or in another street, unattended, except by the owner watching him from a distance of five or six feet.

EVERY HORSE MUST BE PROPERLY SECURED OR ATTENDED IN A CROWDED BUSINESS STREET of a city, when there by the act of his owner, and subject to his control, no matter how gentle or amiable such horse may be.

THE FACT THAT A LOOSE HORSE WAS FRIGHTENED BY THE EFFORTS OF PERSONS TRYING TO STOP or capture him, and was thereby caused to run away, will not relieve from liability his owner, who was guilty of negligence in leaving him unfastened and unguarded in the public streets.

W. R. Hodgson, and Broyles and Johnston, for the plaintiff in error.

Weil and Brandt, for the defendant in error.

BLECKLEY, C. J. In an action for a personal injury resulting from being run over by a horse, Dewald obtained a verdict against Phillips for five hundred dollars; and the court refusing to grant a new trial, Phillips excepted. Several grounds were embraced in the motion for a new trial, but all of them were waived, except those involving the sufficiency of the evidence, and one other which questions the admissibility of certain testimony.

The horse, while in harness and attached to a buggy, was left standing in the street at the corner of Alabama and Broad streets, in the city of Atlanta. Phillips, the owner, stood on the sidewalk watching him, not farther from him than five or six feet. A dray, loaded with gas-pipes, approached from the rear, and the horse walked off slowly down Alabama Street. Phillips followed "in a trot" to catch him. Some negro barbers ran out of their shop and frightened him. On reaching Whitehall Street, he turned as if to take that street, but the barbers, or others, by their interference, caused him to swerve from his course, and continue down Alabama Street. He was then going in a sweeping trot, and Phillips could not overtake him. The people on the street ran out, some throwing up their hands, trying to stop him. They frightened him so that he got to running very fast. Reaching the corner of Alabama and Pryor streets, he ran upon the sidewalk, struck Dewald,

a man over sixty years of age, who did not see him, threw him down, knocked him insensible, and injured him very severely. There was a large wound of the scalp, a fracture of the shoulder-blade, the rupture of a membrane of the ear, causing hemorrhage at the time and partial deafness afterwards. Dewald was confined to his bed for half a month, suffering great pain; was unable to attend to business for three months; cannot, without pain, raise the arm to his head, or take off his coat; has to be assisted to remove his coat, overcoat, and vest, and has to walk with a cane. He incurred expenses for medicine, medical services, and nursing to the amount of three hundred dollars. His average earnings in his business prior to the injury were two thousand or two thousand five hundred dollars a year.

The horse was used to the city, was very gentle, easily controlled; a lady had frequently driven him; he often stood on the street, near defendant's door, in the business part of the city, unhitched, drays and other vehicles constantly passing. He was not vicious, but had life; was fancy and stylish, restless, and very high-strung; was quite sensible,—would pick up your handkerchief, and at his stall would fondle with you. He had about a three-minute gait, and perhaps lacked but little of being thoroughbred. When under the saddle he was hard to hold, but in harness was tender of mouth, and with any one holding the reins, was under complete control, and very easily managed. He had been driven up to and past a locomotive at a crossing; had gone quietly in a buggy with a railroad train passing him from behind; and one witness had, a dozen or more times, driven him, riding out young ladies, crossing the railroad, and always found him gentle and manageable. The defendant had owned him some time, had never had an accident with him before, nor, so far as appears, had any previous owner or other person.

1. The declaration alleged that the defendant negligently left the horse in the street, attached to a buggy, unhitched and unattended. The diligence in securing his horse and preventing his escape which the defendant was bound to observe was that care which every prudent man exercises, or would exercise, in dealing with similar horses at a like place under like circumstances. The omission of that degree of diligence would be negligence; and whether it was omitted or not in this instance was a question for the jury. From the facts above recited, all of which appeared in evidence, the jury

concluded that the negligence was established, and we think their conclusion was well warranted.

Though a horse be sensible, very gentle, and accustomed to stand unhitched at his owner's door in a busy, noisy street, yet if he be fancy, stylish, restless, and very high-strung, the jury may infer negligence from leaving him loose elsewhere in the same or another street, unattended, except by the owner watching him from a distance of five or six feet.

It is said that the horse was not vicious, or if so, the defendant did not know it. A vicious animal is any individual of a vicious species, or a vicious individual of a harmless species. This horse was neither, and consequently the learning touching vicious animals, whether derived from statutes or judicial decisions, has nothing to do with the case. Every horse whatever, no matter how gentle and amiable, must be properly attended or secured in the crowded business streets of a city, when there by the act of the owner and subject to his control. The instincts common to the species render this necessary, and of these instincts every owner must be presumed to have notice. The qualities of the individual horse have no relevancy, except as throwing light upon the means proper to be used to secure him, and the kind of attendance or other precautions which common prudence requires.

2. Again, it is argued that though the horse may have been loose in the street by negligence, it was not that negligence, but the direct acts of others, which caused him to run away. Also, that the injury to the plaintiff was too contingent and remote, as related to defendant's negligence, to be the subject of recovery in damages. It may be fairly anticipated by one who negligently leaves a horse and buggy to straggle through a city that efforts will be made to stop or capture the horse, and that such efforts, or other movements or noises, may cause him to run away, and that if he should run away, some person may be hurt. Between leaving a horse to go at random where there is great danger of doing mischief, and hurling a missile at or into a crowd, careless if it strike or not, there is but little difference. The horse may be regarded as a squib, slow at first, but likely to become swift and destructive.

When a horse attached to a buggy is, by the owner's negligence, loose in the street and moving at will, persons who see the horse thus going at large are at no fault for trying to stop or capture him, and if by their rush, throwing up of hands, or other demonstrations, they frighten him and cause him to run

away, invade the sidewalk, and injure a person passing lawfully thereon, the owner will be responsible in damages for the injury: *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199; *McDonald v. Snelling*, 14 Allen, 292; 92 Am. Dec. 768; *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29.

3. Some evidence touching the character or conduct of the horse after this cause of action arose was admitted over defendant's objection, but the ground of objection is not stated in the record. No ground of objection to certain evidence being stated, either in the motion for a new trial or in the bill of exceptions, the admissibility of the evidence is not for adjudication by this court.

Judgment affirmed.

ANIMALS — NEGLIGENCE IN SCOURING AND DRIVING. — Every man is bound to use due care under the circumstances existent in driving and securing animals: *Lawson's Rights and Remedies*, sec. 1389, and cases cited.

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CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

REID v. LADUE.

[66 MICHIGAN, 22.]

VENDOR OF HIDES IS ESTOPPED FROM CLAIMING TO RECOVER FOR ALLEGED SHORTAGE in the weight of the hides sold by him, where, after discovering that he has been defrauded by short weights, he settles with the vendee according to the latter's reports of such weights, without making any claim for the shortage, or even calling the vendee's attention to the matter.

OPINIONS AND SURMISES NOT TESTIMONY. — The fact that a vendee of hides made a mistake or acted fraudulently in weighing them on two or three occasions during the last year of his dealings with the vendor is not evidence from which it can be presumed that he did so eight years before. Nor is it competent for the vendee, in an action brought to recover for the shortage in weights, to give his opinion that he had been unfairly dealt with during the intervening years, and thus undertake to fix an average per hide by which the suspected shortage may be measured and ascertained during those years.

ASSUMPSIT. The opinion states the case.

James H. Pound, for the appellant.

Edwin F. Conely, for the defendants.

SHERWOOD, J. The plaintiff in this case, a drover and butcher, did business in Detroit. He was accustomed to sell his hides taken from the slaughtered animals to the defendants at various prices agreed upon, but never for less than six and one half cents per pound.

It was the custom of the parties in weighing the hides to have it done by a servant of the plaintiff with one of the defendants, and when the weight was ascertained at the scales

it was called off in a loud voice by one of them to the defendant George N. Ladue, and he in turn repeated the weight in the presence and hearing of the plaintiff or his servant, and which, thus verified, he then apparently entered upon paper; and when the weighing was done he made a duplicate statement of the weight he had entered and apparently so verified to the plaintiff, who settled and was paid for the hides according to the weight given him upon the duplicate ticket.

Reid claims he was cheated in the weight of his hides made so apparently fair, and furnished to him by the defendants, and gives this statement of how it was done and how he detected the fraud.

He says on the twenty-third day of March, 1885, he was in an apartment of the building in which at the time the weighing on that day was going on, but was not seen by those engaged in weighing, and as the servant called off the weights, he heard him, and took the amounts down upon paper, and afterwards, on comparing the weights made that day with those furnished him upon the ticket by the defendants, he found a discrepancy, which was in favor of the defendants. This mode of obtaining the true weight of the hides he repeated by himself or servants three times with like results. He took the weight once afterwards in the presence of the weighers and the said defendant in such manner as all knew he had taken the weight as announced by the servant, and in this instance the weight furnished by defendants was right, and the same as he had taken.

The plaintiff claims by reason of the false weights of his hides so taken and rendered to him by defendants he has lost ten per cent of their value, and that this system of fraud has been practiced upon him by defendants for a long time, it being during the entire time he had sold them hides, and brought this suit in *assumpsit* to recover for the amount of damage he had sustained in consequence of the deficiency in weights occurring as above stated.

The defendants pleaded the general issue.

On the trial, the plaintiff was allowed to recover the sum of \$132.98 under the direction of the court.

It appears from the testimony that the deficiency in the weight on March 23d amounted to \$3.01; on the 31st of March, to \$7.49; and on April 18th, to \$7.47,—these being the three occasions on which the plaintiff took or caused to be taken the weights without the knowledge of the weighers

and Ladue; also that the plaintiff, with full knowledge of the shortage on the March weights, settled with the defendants therefor, and received his pay on the sales then made according to the statements of the weights as presented by the defendants, without making known to them that he was cognizant of the alleged shortage, or making any claim therefor; and it further appears that when the plaintiff undertook to settle for sales made April 13th on the statement of weights presented by the Ladues, he was asked to take the sum of \$117.26, and after some controversy the parties failed to settle, and the plaintiff brought this suit, claiming to recover, not only for the sale made in April, 1885, but also for the shortage ascertained in the March sales of the 23d and 31st, and a ratable proportionate amount upon all sales of hides made to the defendants from the time the plaintiff commenced dealing with the defendants, in 1877, until the 13th of April, 1885.

The court held that, in regard to the claim made for the shortage in the March sales, the plaintiff having settled with the defendants for the amount of those sales and with a full knowledge of the fact that he was accepting of less than the hides came to under his contract with defendants for them, and without making any claim for the shortage, or even calling the subject to the attention of the defendants, he is estopped from now recovering therefor.

In this holding we think the court was correct.

It was the plaintiff's duty, under the circumstances, to have brought forward his entire claim which the parties were engaged in settling, and if he purposely omitted or kept back a portion of it when settling, he will not be allowed to recover for the omitted portion thereafter, and this is now what is sought to be done by the plaintiff. In regard to the sale made April 13th, the verdict gives the plaintiff all he claims.

Counsel for plaintiff, to sustain his claim for shortage on all purchases made by the defendants of plaintiff during the years the parties were having dealings, proposed to show, —

"1. That during that period plaintiff sold to defendants 9,046 hides, and that on the three sales made March 23 and 31 and April 13, 1885, defendants did not pay within thirty-two cents per hide of the contract price for the same, and did not pay to plaintiff for the other hides sold during that period within thirty-two cents per hide, true value.

"2. That the general practice of the defendant Ladue, in

buying hides of plaintiff, was to go to the plaintiff's slaughter-house, and there have them weighed, he being the only man that took a written memorandum of weights; that he would keep one copy, and make a duplicate out for plaintiff's man, as the correct weight for plaintiff to settle by, and which he did afterwards settle by, with the exception of the last time, April 13th"; and "that they were subject to the same defects and frauds as we have specified in the sales of March 23d, 31st, and April 13th."

"3. That plaintiff is an expert; that he has been in his present business sixteen years, and is an expert in regard to hides, and everything pertaining to the hide business; and that he can approximate the weight of his hides, and can tell about how much, in his judgment, his losses have been, and I offer his testimony for that purpose; that he has had a contract with defendants for the sale of all his hides at a certain rate per pound, never less than six and one half cents, and that he can approximate his losses in this connection, and what the defendants have defrauded him of, and that said hides never weighed less than seventy pounds each."

The facts contained in the foregoing propositions were all proper to be shown, if the proof of them could have been made by competent evidence. But the fact that the defendants made a mistake or acted fraudulently in weighing the hides two or three times in 1885 is not testimony from which it may be presumed that they did so in 1877, eight years before. Nor was it competent for the plaintiff to give his opinion that he had been dealt unfairly by for seven years in the weight of the hides, and then undertake to fix an average per hide by which the suspected shortage might be measured and ascertained during all that period. Such opinions and surmises do not rise to the dignity of testimony, and much less to the plane of evidence.

It is unnecessary to consider the other exceptions, as what has been said must necessarily dispose of the case.

We think the circuit judge gave the proper directions to the jury, and the judgment must be affirmed.

EVIDENCE. — Conclusions and suppositions of a witness are not evidence against another: *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851. The opinion of a witness, except in expert testimony, is not legitimate evidence as to any matter that may be reproduced before the jury by a witness, it being the province of the jury to form their own opinion on facts of common experience, uninfluenced by the opinion of any witness: *Mass v. State*, 23 AM. ST. REP., VOL. XL.—30

Fla. 611. And even scientific opinions of experts, when pitted against facts, are worthless: *Stone v. Chicago etc. Ry Co.*, 66 Mich. 76. But where the opinion of a witness as to the appearance of an object which he has seen is the only evidence attainable, it is not inadmissible because it is a mere opinion: *State v. Parker*, 96 Mo. 582.

ESTOPPEL. — One who remains inactive at a time when he should assert his lawful rights is estopped from subsequently asserting such rights to the detriment of others: *Hafter v. Strange*, 65 Miss. 323; 7 Am. St. Rep. 659, and note 662; *Alabama etc. R. R. Co. v. South and North Alabama R. R. Co.*, 84 Ala. 570; 5 Am. St. Rep. 401, 412; *New York Rubber Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822, and note 826; *San Antonio v. Strumberg*, 70 Tex. 379.

WEBBER v. BARRY.

[66 MICHIGAN, 127.]

WAIVER OF OBJECTION TO PROSECUTING ATTORNEY'S PARTICIPATING IN CIVIL

ACTION. — A defendant in a civil action, by pleading to a declaration filed by an attorney who participated in a criminal prosecution against the same defendant, growing out of the same state of facts that is relied upon for a recovery in the civil action, thereby waives any objection he might have taken to such attorney's commencing said action. If he knows of the attorney's participation in the criminal prosecution, he must make his objection at the beginning, and if he does not know of it then, he must make his objection as soon as he finds it out. He cannot be permitted, knowing of such participation, to sit by and allow such attorney to select a jury, without objection, and then object to the swearing of the jury or the giving of any testimony in the case.

WITNESS CANNOT, ON CROSS-EXAMINATION, BE ASKED WHAT DEFENDANT SAID AT MEETING, where the plaintiff has introduced no testimony of the meeting, or of what was said or done at it.

NO MAN HAS RIGHT TO ENTER ON PREMISES OF ANOTHER TO INDUCE HIS EMPLOYEES to leave their employment to the injury of the employer, for the purpose of getting higher wages, or shorter hours of labor for the same pay, or for any other purpose; and if he does so enter, he is a trespasser.

TRESPASS brought by the plaintiff against four defendants. In July, 1885, the plaintiff, as trustee, was in possession of a steam saw-mill and salt-block, known as the Wickes's Mill and Block, and then had employed in operating the same sixty or seventy men. On the 11th of July, 1885, the establishment was in full operation and in good running order. The declaration was in two counts. The first count, after describing the nature and situation of the property injured, and stating that the defendants entered unlawfully and with force, together with two hundred other persons with whom they were acting in concert, and that steam was the motive power used

in the mills to run the machinery, alleged that when, on the day aforesaid, the defendants, with said other persons, broke and entered plaintiff's close, they did, with force and arms, and in a violent and unlawful manner, shut off the steam, and thereby caused the machinery to stop, and extinguished the fires in the furnaces, and that this was done in so violent, unlawful, and improper a manner that plaintiff's mill was set on fire, and damaged to the extent of five thousand dollars; that the defendants, and those who accompanied them, with force and arms, and without any lawful authority, stopped from their work plaintiff's employees, and that by reason of the unlawful acts and trespasses of defendants and those accompanying them, plaintiff was wholly unable to continue his manufacturing of lumber and salt for the period of six weeks; that by reason of his inability to continue the manufacture of lumber he suffered damage in the sum of six thousand dollars; that by reason of his inability to continue the manufacture of salt, he suffered damage in the sum of ten thousand dollars, and that by reason of said trespasses, plaintiff was otherwise greatly hindered and obstructed in the conduct of his said business, from which he suffered damage in the sum of ten thousand dollars. The second count, alleging combination and conspiracy to commit the unlawful acts, charged that on said eleventh day of July, 1885, said defendants, with two hundred other persons, did unlawfully and maliciously combine and conspire together to obstruct and impede the regular conduct and operation of plaintiff's said mill and salt-block; that said defendants, and the other persons referred to, in pursuance of said combination and conspiracy, on said day, with force and arms, etc., broke and entered said close of plaintiff; that they went into the engine-room and assaulted the engineer, and shut off the steam, and stopped the machinery, and extinguished the fires, doing so in so improper, violent, and unlawful a manner that said mill was thereby set on fire, and damaged to the amount of five thousand dollars; that they stopped from their work plaintiff's said employees, and by reason of the trespasses by them then and there committed, the plaintiff was hindered and prevented from doing and conducting his said business for six weeks; that by reason of his inability to continue his business in manufacturing lumber during said period he suffered damage to the amount of six thousand dollars; that by reason of his inability to continue his business in manufacturing salt during said period he suffered damage

to the amount of ten thousand dollars; and that by reason of the aforesaid and other trespasses, then and there committed by the defendants, he was otherwise greatly damaged and injured. Plea, the general issue. There was a verdict for the plaintiff for \$290.10, upon which judgment was entered, and the defendants brought error. It appeared, from the record, that James H. Davitt, an attorney, had been employed by the county board of supervisors to assist the prosecuting attorney in the prosecution of four criminal cases against the defendants, depending upon the same state of facts as in this case; that in one of these cases, defendant Barry had been just tried, and the other three were still pending; that in all these cases Davitt assisted, and is assisting, the prosecuting attorney; that Davitt was, while aiding in these prosecutions, called the assistant prosecuting attorney of the county, and was paid from the county funds by direction of the board of supervisors. It also appeared that he was the attorney who commenced this suit, and was the attorney of record, and noticed the cause for trial, and assisted in selecting the jury before which it was tried. After the jury was selected, and before it was sworn, counsel for defendant Barry objected to the swearing of the jury, and to any testimony being received in the case, because of the facts above stated, which plaintiff's counsel admitted to be true. The court overruled the objection. This objection was based upon Howell's Statutes, section 557, as amended by Act No. 32, Laws of 1883, which reads as follows: "No prosecuting attorney shall receive any fee or reward, from or on behalf of any prosecutor or other individual, for services in any prosecution or business to which it shall be his official duty to attend, nor be concerned as attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend, or in any action for malicious prosecution brought in consequence of any criminal prosecution commenced or prosecuted during his term of office in the county of which he is prosecuting attorney; nor shall any attorney be permitted to prosecute, or aid in prosecuting, any person for an alleged criminal offense, where he is engaged or interested in any civil suit or proceeding depending upon the same state of facts, against such person, directly or indirectly." The view of Sherwood, J., to which reference is made in the opinion of the court by Morse, J., in reference to this objection,

is as follows: "In the statute relied upon to sustain defendant's objection, it will be noticed that the disability of the prosecuting attorney, or his assistants acting in the civil suit, is confined to the parties in the criminal suit (except that they may prosecute civilly for the state or county) in a case involving the same state of facts as in the criminal suit; and further, that the disability is confined to acting for, and not against, the respondent in the civil action. In the present case, neither of the parties in the criminal case prosecutes. I do not think respondents' objection was well taken." Other facts are stated in the opinions.

Frank L. Dodge and Jerome W. Turner, for the appellants.

Wisner and Draper, for the plaintiff.

MORSE, J. Upon the argument of this case, I was inclined to think that error had been committed in some of the proceedings upon the trial. A subsequent careful examination of the record leads me to the conclusion that the verdict and the judgment of the court below should stand.

I shall only refer here to the points raised in the case that seemed to me, on the argument, to have been erroneously decided by the circuit judge.

It struck me quite forcibly, at first, that Davitt should not have been allowed to act as an attorney in the case against the defendants; and also that the witness James B. Walsh should have been permitted, on cross-examination, to answer the question: "Do you remember what he [Barry] said to the men that day about observing the law, if anything?"

But on an examination of the record, it does not appear that Davitt acted in the case at all after the objection was made, nor does it appear that when he commenced the suit he had then been engaged in the criminal cases. It would have been the most proper course, it seems to me, for the defense to have objected to Davitt's taking any part in the trial at the beginning. Instead of this, they sat by and allowed him to participate in selecting the jury without any demur or protest. They knew then as well as afterwards the part he had taken in the criminal prosecutions. But they wait until the panel is full and accepted by them, and then raise an objection, not to Davitt's continuing to act further in the case, or that the panel selected be discharged and a new one obtained without his aid, but they object to the swearing of the jury, or the giving of any testimony in the

case. They seek to stop the proceeding, and to secure a discontinuance of the case, because of a participation therein by Davitt, to which they at the time made no objection. If, when they pleaded to Davitt's declaration, he had taken part in the criminal proceedings, their plea was a waiver of any objection they might have to his commencement of the suit; and if they found it out later, it was their duty to move at once. In my opinion they waived by their acts all legal objection, if there was any, to the commencement of suit by Davitt, or his participation in selecting the jury.

In any event, I am not prepared to say that my brother Sherwood is not correct in his view of this matter; but I prefer to reserve my opinion upon the question of Davitt's legal right to participate in the trial of this cause, had such right been questioned at a seasonable time and in the proper manner.

In relation to the testimony of James B. Walsh, it appears that he was called by the plaintiff, and gave testimony upon his direct examination of what the defendant Barry said to a meeting of men on the evening of the 10th of July, the day before the occurrence at the mill of the plaintiff. The defendants' counsel, I find, were permitted to cross-examine the witness fully as to all that Barry said in his speech that night. But the counsel undertook to go further, and asked this question: "Q. Did you hear the speech delivered by Barry on the forenoon of the 10th? A. Yes, sir."

Then the following question was propounded: "Do you remember what he said to the men that day about observing the law, if anything?"

This was objected to by plaintiff's counsel as calling for a statement of the defendant to be used as evidence in his own favor, and as being no part of the cross-examination, as plaintiff had introduced no testimony of this forenoon meeting, or what was said or done there. This appears, from the record, to be a good objection, and the question was properly ruled out. The plaintiff had given no evidence in relation to this meeting, and therefore what Barry said there was not admissible, at least at that stage of the proceeding.

I am fully satisfied that the defendant Barry had no right to lead a gang or a mob of men upon the premises of plaintiff, to interfere in any manner or to consult with the men who were in the employ of plaintiff. If he did so, he must be held responsible for their acts of violence, notwithstanding that he

halted them two hundred feet from the mill, and told them to remain there until he came back. The trouble with Barry's case is, that he had no business himself upon the premises of plaintiff for the purpose that he admits he was there. It was none of his business whether the men working for plaintiff were satisfied to work eleven or eleven and a half hours per day, or not. The real *animus* of his visit was, as can plainly be seen, to induce the employees of plaintiff to join the men already gathered in a strike for ten hours. Whatever right he may have had to influence these men to quit work, unless the ten-hour demand was acceded to by their employer, while they were not at work, he certainly had no right to enter upon the premises of such employer to influence these men while they were at work. He had no license, by custom, or otherwise, to enter upon the premises of plaintiff, or into the mill, for any such purpose, and he was a trespasser the very moment he did so. He also well knew the character and intent of the crowd he took with him. He was its acknowledged leader, and in taking them where he had no right to take them, he became responsible for their acts, whether done by his consent or against his protests.

It cannot be said that Barry, according to his own testimony, was there for any lawful purpose. No man has a right to enter upon the premises of another for the purpose of inducing persons in the employ of that other to leave their employment to the injury of the employer, for the purpose of getting higher wages, or working less hours for the same pay, or for any other reason. The man who so enters is a trespasser. No matter if, by the custom of this free country, license is impliedly given to all persons to enter our private grounds or places of business, that license is nevertheless considered revoked the moment the person so entering interferes unlawfully with our rights or our property. He then becomes a trespasser *ab initio*. Much less can he lead a crowd of two hundred men upon my premises, and then excuse himself for their wrong-doing because he told them not to injure my property, when the avowed purpose of their entrance was to interfere between the men in my employ and myself. A crowd of this size is liable at any moment to become a mob, and an excited mob can seldom be controlled by any one. Even their leaders become powerless oftentimes to prevent not only the destruction of property, but the shedding of blood. Mr. Barry must suffer the consequences of his ill-advised and un-

lawful entrance with this body of men upon the premises of plaintiff, who has a right to be protected in his property, and to be recompensed for the damages he has suffered.

It does not help the laborer to countenance such acts as these. The unlawful interference with the rights of others, and the destruction of property, cannot aid any one. The law cannot be taken in our own hands to remedy our wrongs by inflicting wrongs upon others. He who goes outside the law to obtain his rights, whether fancied or real, will find in the end that the law he has spurned or violated will yet, and in justice, compel him to respect it, by taking from him what he has gained in disregard of it, and forcing him to recompense those he has illegally damaged by his conduct.

The judgment should be and is affirmed, with costs.

SHERWOOD, J., delivered an opinion, in which, after stating the facts of the case, he dissented from the majority of the court on certain points, which will appear from the following extracts: "Counsel for plaintiff had been permitted to give evidence tending to show that, on the day before the alleged trespass, defendants had been out with the crowd visiting mills and shutting them down, and what defendant Barry did and said on that day, evidently for the purpose of showing unlawful intentions and acts of said defendants. Upon the cross-examination, counsel for Mr. Barry asked witness, after he had testified that he heard Barry's remarks to the crowd in the morning: 'Do you remember what he said to the men that day about observing the law, if anything?' This was objected to as immaterial, and the objection was sustained by the court. I think this ruling was error. The objection that it was not proper cross-examination was not made; but if it had been, it could not have properly prevailed. The testimony was relevant and material, in view of the direct examination of the witness. It bore upon the intentions of the party, and his combining and conspiring with others to commit injury to the property of plaintiff; and if the plaintiff was entitled to call for so much as made against him occurring on the 10th, the defendant certainly was entitled to whatever made for him; and whether it would be sufficient to repel the charge of trespass or not, it would have a bearing as to the amount of recovery, and as to the conspiracy to injure property. The amount of damage the plaintiff ought to recover, or the amount that he should recover for any particular item of injury, was solely for the jury in this case to determine; and the instruction of the court to them that they should find for the plaintiff seventy-eight dollars for damage to the boiler, and sixty-two dollars for loss of the use of the mill, ought not to have been given. It was error. Both these sums were ascertained from the opinion of witnesses, and that kind of testimony on the subject of damages is always for the jury. The following portion of the charge of the court was excepted to by counsel for the defendants, viz.: 'Now, if those parties, Mr. Barry, for instance, who was with those men, if the circumstances were such when they arrived at the Wickes mill, before he entered upon these premises, that he, as an ordinarily prudent man, had reason

to apprehend that they might, some of them, commit acts of violence, he would be responsible for taking the men onto the premises without the consent of the proprietors, under such circumstances. That he had such an apprehension is evidenced by the fact that before they commenced their journey at all, he advised them to refrain from any acts of violence; that he had such apprehension is evidenced by the fact that while they were on the premises, he himself says that he requested them to remain at some distance from the mill, until he went into the mill personally. They, as he states it, disobeyed his request, and followed him into the mill. Now, taking them onto the premises without the permission of the owners of the property, under such circumstances, would render a party who was with them liable for their acts. I might remark that there is evidence tending to show that, after these acts were committed, he went away, and took these men to another mill, notwithstanding they had committed these acts of violence. All these circumstances satisfy the court, the evidence not being disputed, as a matter of law, that these defendants are not only liable for the trespass, but are liable for the wrongful acts that others committed there at that time. One is liable for all, although he personally might not have taken any part in it.' In this instruction, I think the learned circuit judge went too far. The defendant Barry states that he went with the crowd, on the occasion mentioned in the declaration, within two hundred feet of the mill; that he there halted the men, and told them to remain there until he could see the foreman in the mill, and ask permission to see the men, and learn from them whether the men were satisfied with their present system of working eleven or eleven and a half hours per day, or whether they desired to join the movement for ten hours; that they consented to remain; that he had no other business there; that there was no understanding that the crowd should come into the mill after he left them and went in, and he did not know of their going into the mill until he saw them in the fire-room; neither was there any understanding that the Wickes mill should be closed down; that he did not go there for that purpose, and had no intention of closing down the mill; that he was in the mill about ten or fifteen minutes, looking for the foreman, before the crowd came in; that he believed he had some influence with the men; that they came to the mill against his understanding with them that they would not; and that when they came in, he got them out as soon as he could, which took from three to five minutes, and that he did not see them put out the fire. The testimony, and what it proved, was for the jury. If Barry's statement of his connection with the transaction is true, it would go far to exculpate him; especially is this true when there was testimony showing that the object of taking the crowd with him was for a lawful purpose, and that he urged them to obey the law, and to commit no acts of violence to persons or property. While it is entirely proper for the circuit judge to refer to the testimony upon any given point, and state to them what it tends to prove, it is not proper for him to single out any particular fact, and say to them it is proved by showing some other fact, or that the fact is evidenced by any other in the case; and especially is this so when the fact singled out, and sought to be established, consists of what a person thought or believed at a particular time. The paragraph quoted has this infirmity. It substantially directed the verdict against the defendants, and the error was prejudicial to the defendant Barry, at least, and must necessarily have had its effect upon the defense made by the others." And for these errors, he thought 'the judgment should be reversed, and a new trial granted.

LIABILITY OF PERSON WHO INTERFERES BETWEEN EMPLOYER AND EMPLOYEES, EITHER TO OCCASION THE LATTER TO BE DISCHARGED OR TO VOLUNTARILY LEAVE THEIR EMPLOYMENT. — One who knowingly and willfully entices away the servant of another, inducing him to violate his contract with his master, and thereby depriving the master of the services of a person actually in his service, or bound by contract to render him service, is liable to the master for the actual loss which he sustains therefrom. This doctrine is firmly established in England and in the courts of this country where the question has arisen: *Wood's Law of Master and Servant*, 450; 3 Bla. Com. 142; *Hart v. Aldridge*, Cowp. 54; *Keane v. Boycott*, 2 H. Black. 511; *Gunter v. Astor*, 4 J. B. Moore, 12; *Pilkington v. Scott*, 15 Mees. & W. 657; *Hartley v. Cummings*, 5 Com. B. 247; *Lumley v. Gye*, 2 El. & B. 216; *Bouen v. Hall*, L. R. 6 Q. B. D. 333; *Evans v. Walton*, L. R. 2 Com. P. 615; *Hewitt v. Ontario Copper Lightning Rod Co.*, 44 U. C. Q. B. 287; *Milburne v. Byrne*, 1 Cranch C. C. 239; *Plummer v. Webb*, 4 Mason, 380; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, 43 Id. 601; *Hightower v. State*, 72 Id. 482; *Dickson v. Dickson*, 33 Ia. Ann. 1261; *Butterfield v. Ashley*, 6 Cush. 249; *Walker v. Cronin*, 107 Mass. 567; *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Noice v. Brown*, 39 N. J. L. 569; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393; 60 How. Pr. 168; *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780; *Daniel v. Smearengen*, 6 S. C. 297; 24 Am. Rep. 471; *Huff v. Watkins*, 15 S. C. 82; 40 Am. Rep. 680. In *Haskins v. Royster*, *supra*, Rodman, J., in delivering the opinion of the court, said: "We take it to be a settled principle of law, that if one contracts upon a consideration to render personal services for another, any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we should not find it in the laws of the freest and most enlightened states in the world. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons." In the case of *Lumley v. Gye*, 2 El. & B. 216, which is the leading English case on this subject, Crompton, J., said: "Whatever may have been the origin or foundation of the law as to the enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly, and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law." There is some difference of judicial opinion as to the origin of this rule of law.

In delivering the opinion of the court in *Walker v. Cronin*, 107 Mass. 567, Wells, J., said: "It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the

contract, and not merely from the relation of master and servant; and that it applies to all contracts of employment, if not to contracts of every description." This is also the view upon which the case of *Bowen v. Hall*, L. R. 6 C. P. D. 333, was decided. The principle upon which the rule rests is thus stated by Brett, L. J., in that case: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. If these conditions are satisfied, the action does not the less lie, because the natural and probable consequences of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own willful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact." But in the case of *Johnston Harvester Co. v. Meinhardt* 9 Abb. N. C. 393, 60 How. Pr. 168, Macomber, J., who delivered the opinion of the court, said: "As is well known, the origin of this kind of actions was at a time of the substantial enslavement of domestic servants, and at the outset it proceeded upon the theory that such servants had not freedom of action which is conceded to that class at the present day; yet in one way or another the doctrine has been extended, as has been shown above, not only in England, but in parts of the United States, to cases which in its inception it did not cover. I am disinclined to extend by any judgment of mine the doctrine of recovery for enticing away servants, where both in fact and theory the person enticed is a free agent to come and go as he will, responsible only, like other persons, for the violation of his contract or his duty." In reference to the statute of laborers, the learned judge said: "The statute of Edward III., known as the statute of laborers, in the year 1349, was coarse and brutal in its provisions, and was designed to meet coarse and brutalized conditions of society which followed immediately upon the ravages of the plague."

RULE APPLIES TO CROPPERS. — Where work is being done under a contract by which the laborer is to be given a part of the crop made in payment of his labor in cultivating it, he is a servant within the meaning of the rule, and an action will lie for enticing him away, the same as though he was hired for a definite period of time, and was to be paid his wages in money: *Wood's Law of Master and Servant*, 461; *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780; *Huff v. Watkins*, 15 S. C. 82; 40 Am. Rep. 680, overruling *Burgess v. Carpenter*, 2 S. C. 7; 16 Am. Rep. 643; *McCutchin v. Taylor*, 11 Lea, 259. In delivering the opinion of the court in *Haskins v. Royster*, *supra*, Rodman, J., discussing this point, said: "It is suggested that the contractors of the second part in this contract are croppers, and not servants. By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop. But such a person is not a tenant; for he has no estate in the land, nor in the crop, until the landlord assigns him his

share. He is as much a servant as if his wages were fixed and payable in money."

THE RULE ALSO APPLIES TO ONE EMPLOYED TO DO WORK BY THE PIECE, where he leaves work unfinished. A person employed by the job or piece is regarded as being retained until the job or piece is finished. And one who entices him away before that time is liable to an action for damages: *Hart v. Aldridge*, Cowp. 54; *Blake v. Lanyon*, 6 Term Rep. 221; *Gunter v. Astor*, 4 J. B. Moore, 12; *Boston Glass Manufactory v. Binney*, 4 Pick. 425; *Walker v. Cronin*, 107 Mass. 555; Wood's Law of Master and Servant, 459.

ACTUAL SERVICE NEED NOT BE SHOWN in order to maintain the action, provided there be shown a valid subsisting contract for services to be performed thereunder. Nor is it necessary that the relation between the employer and the employee be strictly that of master and servant: Wood's Law of Master and Servant, sec. 232; *Lumley v. Gye*, 2 El. & B. 216; *Bowen v. Hall*, L. R. 6 Q. B. D. 333. In the case of *Lumley v. Gye*, *supra*, the plaintiff made a contract with Johanna Wagner under which she agreed to perform at his theater for a certain time, and not to sing or use her talents elsewhere during the term without his consent in writing. The defendant, with knowledge of this contract, persuaded Miss Wagner not to perform it. The declaration did not allege that she had entered upon the performance of her contract, so that the question raised was, whether a recovery could be had in an action for persuading one not to enter another's employ under a binding contract to do so, or whether an actual subsisting service must be shown. The court held that an action lies for procuring the breach of a subsisting contract, even though the relation of master and servant has not arisen under it. Crompton, J., in discussing this point, said: "With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defense. The procurement of the breach of the contract may be equally injurious whether the service has begun or not, and, in my judgment, it ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto."

OBLIGATION OF SERVICE MUST BE SHOWN. But in order to maintain an action for enticing away a servant, it must be shown that there existed at the time of the enticement an obligation on the part of the person enticed to render service to the plaintiff: *Peters v. Lord*, 18 Conn. 337; *Butterfield v. Ashley*, 2 Gray, 256; *Campbell v. Cooper*, 34 N. H. 49; *Caughey v. Smith*, 47 N. Y. 244; *Forbes v. Cochrane*, 2 Barn. & C. 448; *Cox v. Muncey*, 6 Com. B., N. S., 376; *Sykes v. Dixon*, 9 Ad. & E. 693. In the case of *Butterfield v. Ashley*, 2 Gray, 256, Metcalf, J., in delivering the opinion of the court, said: "To constitute enticement of a servant from his master's service, within the meaning of the law, inducements must be presented to him, while he is in the service, which cause him to leave it. After he has, of his own accord, left such service, and while he is out of it, he cannot be enticed from it." And in *Caughey v. Smith*, *supra*, Folger, J., delivering the opinion of the court, said: "But to maintain an action for enticement from service, it must appear that the child, apprentice, or servant was at the time in the actual service of the parent, or master, and that the moving cause of desertion was the inducement held out by the defendant. If, before the child, apprentice, or servant had ever met or communicated with the defendant, there had been an abandonment of the service, it cannot be maintained that there was an enticement therefrom by the defendant." To induce a servant to leave his master's

service when his period of service shall expire, is not the subject of an action, although he may not have had any previous intention of quitting such service: *Nichol v. Martyn*, 2 Esp. 732; *Boston Glass Manufactory v. Binney*, 4 Pick. 425.

It seems, however, that where the person enticed away is, at the time, in the actual service of the plaintiff, although under a voidable contract, an action lies in behalf of the plaintiff: *Keane v. Boycott*, 2 H. Black. 511; *Salter v. Howard*, 43 Ga. 601; Wood's Law of Master and Servant, sec. 234. In *Keane v. Boycott*, *supra*, the defendant, who was a recruiting officer, induced the plaintiff's servant to enlist. As the apprentice's indentures were not binding upon him, the defendant contended that no recovery could be had against him. But Erle, C. J., replying to this contention, said: "The defendant in this case had no concern in the relation between the plaintiff and his servant; he dissolved it officiously, and to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service." And Lochrane, C. J., delivering the opinion of the court in *Salter v. Howard*, 43 Ga. 604, said: "We do not hold that it is necessary, to sustain this action, that there must be a written contract, or that any third party can take advantage of formal defects in one, if written. If under employment the servants are at work, any person intruding upon the rights of the master by enticing them away is liable in an action of damages, and we therefore concur with the court in refusing the new trial sought upon this ground." But the action for enticing away the servant cannot be maintained by the master after he has been paid the penalty stipulated in the contract between him and his servant: *Bird v. Randall*, 3 Burr. 1345. In that case Lord Mansfield said: "Here is no injury at all done to the master; for he has recovered and received a complete satisfaction, and more. Therefore, all the injury is done away, and he is as if it had never existed."

NO ACTION LIES FOR ATTEMPTING TO INDUCE SERVANT TO LEAVE SERVICE of his master, where the attempt does not succeed, and no damage results to the master: Wood's Law of Master and Servant, sec. 237; *Bird v. Randall*, 3 Burr. 1352.

ACTION DOES NOT LIE, UNLESS DEFENDANT KNEW THAT PERSON EMPLOYED BY HIM WAS SERVANT OF ANOTHER at the time, or was under a contract of service to another: *Lee v. West*, 47 Ga. 311; *Morgan v. Smith*, 77 N. C. 37; *Butterfield v. Ashley*, 2 Gray, 254; *Fores v. Wilson*, Peake, 55; Wood's Law of Master and Servant, sec. 238. In *Morgan v. Smith*, *supra*, Rodman, J., delivering the opinion of the court, said: "To enable a plaintiff to recover in an action like the present, he must show that the defendant acted maliciously, not in the sense of actual ill-will to the plaintiff, but in the sense of an act done to the apparent damage of another without legal excuse. There can be no malice and no apparent damage unless defendant knows of the existence of the relation of service."

ACTION LIES FOR COMPELLING SERVANT TO LEAVE SERVICE of his master by coercion or threats of violence: *Dickson v. Dickson*, 33 La. Ann. 1261; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393; 60 How. Pr. 168; Wood's Law of Master and Servant, sec. 239. But in *Ashley v. Harrison*, 1 Esp. 48, Peake, 94, it was held that an action on the case would not lie for libeling an actress, whereby she became afraid to appear on the stage, and the plaintiff lost the profits of her performance.

ACTION FOR HARBORING SERVANT OF ANOTHER. — An action lies against one who continues to employ the servant of another after he has knowledge

or notice that he is such servant, whether he knew that fact or not when he first employed him. The gist of this action is the retention of the servant after knowledge of the fact that his services are due to another: *Fawcett v. Beavres*, 2 Lev. 63; *Blake v. Lanyon*, 6 Term Rep. 221; *Beane v. Walton*, L. R. 2 Com. P. 615; *Everett v. Sherfry*, 1 Iowa, 356; *Ferguson v. Tucker*, 2 Har. & G. 182; *Butterfield v. Ashley*, 6 Cush. 249; *Stone v. Heywood*, 7 Allen, 118; *Sargeant v. Mattheusson*, 38 N. H. 54; *Morris v. Neville*, 11 Lea, 271; Wood's Law of Master and Servant, sec. 240. In delivering the opinion of the court in *Butterfield v. Ashley*, 6 Cush. 250, Metcalf, J., said: "A master may maintain an action on the case against one who, knowing that another is his servant, entices him away from his service, or retains and employs him after he has wrongfully left that service without being enticed away; and also against one who continues to employ his servant after notice that he is such, though the defendant, at the time of retaining or employing him, did not know him to be a servant." But in *Sykes v. Dixon*, 9 Ad. & E. 693, it was held that where a contract of service is invalid, and the servant leaves the service, and is afterwards employed by a third person, the latter is not liable for harboring the servant.

MEASURE OF DAMAGES. — In actions for enticing away servants, the measure of damage is not to be ascertained merely from the loss of the plaintiff at the time, but if malice enters into the wrong done him, the jury may take into consideration all the circumstances of the case, and give as compensation what in their judgment is reasonable that the plaintiff should receive and the defendant pay: *Gunter v. Astor*, 4 J. B. Moore, 12; *Lee v. West*, 47 Ga. 311; *Bisby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Dubois v. Allen*, Anth. 128; *McCutchin v. Taylor*, 11 Lea, 259.

ENTICING AWAY SERVANT IS NOT PUBLIC OFFENSE, but a private wrong, the remedy for which is by an action on the case: *Regina v. Daniell*, 6 Mod. 99.

WHETHER INJUNCTION GRANTED TO RESTRAIN ENTICEMENT OF SERVANTS. — In the case of *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393, 60 How. Pr. 168, it was held that an injunction should not be granted against a confederation of persons whose object was to entice away workmen from their employer's service, in the absence of any sufficient evidence that violence, force, intimidation, or coercion was intended against such workmen. The remedy was held to be an action for damages.

ACTION BY EMPLOYEE AGAINST ONE PROCURING HIS DISCHARGE. — In the case of *Chipley v. Atkinson*, 23 Fla. 206, it was held that an action lies in behalf of an employee against a person who has maliciously procured the employer to discharge him from an employment in which he is engaged under a legal contract for a certain period, provided damage result to the employee from such discharge. Raney, J., who delivered the opinion of the court, referring to the principle stated by Brett, L. J., in *Bowen v. Hall*, L. R. 6 C. P. D. 333, quoted in a former part of this note, and applied by the majority of the court in the decision of that case, said: "The principle applied is as applicable in behalf of an employee so injured through the malicious interference of the third person." It was also held in that case that an actual discharge of the employee by the employer was essential to a recovery in an action by the former against a third person for maliciously and wrongfully procuring his discharge from the employment, and that an unsuccessful attempt to have him discharged was not sufficient.

PINGREE v. DETROIT, LANSING, AND NORTHERN RAILROAD COMPANY.

[66 MICHIGAN, 142.]

**COMMON CARRIER TAKING PROPERTY FROM PERSON NOT AUTHORIZED TO
DIRECT ITS SHIPMENT** has no lien thereon for his services, and no right
to retain the property.

**SEIZURE BY SHERIFF UNDER REGULAR PROCESS OF PROPERTY IN HANDS
OF COMMON CARRIER** for shipment relieves him from liability for its
non-delivery to the consignee.

**COMMON CARRIER IS NOT COMPELLED TO ASSUME THAT REGULAR PROCESS
IS ILLEGAL**, and to risk all the consequences of resisting officers of the
law. If he is excusable for yielding to a public enemy, he cannot be at
fault for yielding to actual authority what he may yield to usurped an-
thority.

CASE. The action was brought against the defendant, as a
common carrier, to recover damages for its failure to safely
carry and deliver in Detroit a quantity of boots and shoes.
The defendant, at the time it received the goods for transpor-
tation, had no knowledge of who was their true owner or of the
title or possession thereof, prior to the time of the delivery to
it. The plaintiffs were in no way parties to the suit of *Fuller
v. Butts*, referred to in the opinion, and the seizure made by
the sheriff was without the consent, connivance, or procure-
ment of the defendant. Other facts are stated in the opinion.

Isaac Marston, for the appellants.

Charles B. Lothrop, for the defendant.

CAMPBELL, C. J. This case presents a single question on
facts found.

Plaintiffs had a chattel mortgage against Francis M. and
Myron C. Butts, which was made on August 4, 1886. The
next day, the two Butts made a transfer of the property to
one Steere. Plaintiffs replevied from Steere, and on August
12th shipped the goods by defendant's railroad from Edmore,
directed to Detroit, taking the usual bill of lading. On the
same day, the goods were taken by the sheriff at Stanton, on
an attachment against said F. M. and M. C. Butts, in favor
of John W. Fuller and others. Defendant notified plaintiffs
of this seizure. Plaintiffs now sue defendant for not deliver-
ing the goods at Detroit. The question is, whether the seizure
by the sheriff exonerated defendant from such delivery. The
court below held that it did.

- There seems to be a little apparent conflict between the cases on this question, but there can be no doubt where the rule of justice lies. If the carrier could rely against all the world upon the right of the consignor to intrust him with possession, then it would be reasonable to hold him estopped from questioning that title. But there is no authority for such immunity. The true owner may take his property from a carrier as well as from any one else. If a carrier gets property from a person not authorized to direct its shipment, he has been declared by the supreme court of this state to have no lien for his services, and no right to retain the property: *Fitch v. Newberry*, 1 Doug. 1; 40 Am. Dec. 33. There is no sense or justice in enabling a consignor to compel a carrier, at his peril, to defend a title that he knows nothing about, and has no means of defending, unless the consignor gives it to him. In the present case, the attachment was against plaintiffs' mortgagors, and was regular. It must have been levied on the claim that plaintiffs had no right to the goods. Defendant could not have resisted the seizure without incurring the risk of serious civil, and perhaps criminal, liability; and if plaintiffs' claim is correct, this must have been done at defendant's own risk and expense.

This precise question was decided in favor of the carrier in *Stiles v. Davis*, 1 Black, 101, upon the ground that defendant was not required to resist the sheriff, and could not properly do so. This rule has been adhered to by the United States supreme court, and followed to a considerable extent. It is the only rule compatible with public order. A carrier must otherwise resist the officer, or find some one who will swear out a replevin, which a carrier usually has not knowledge enough to justify. If the carrier cannot call on the consignor to defend, and must take the risk and the loss, his position would be one of hopeless weakness. If he declines to accept custody of goods, he runs the risk of an action; and if a wrongful holder, by doubtful title, or even by theft, compels him to receive the consignment, he can get the value from the carrier who has had them seized by the true owner, unless the carrier has means of proof, that he never can be presumed to have, of the lack of interest in the shipper.

Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to

a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority.

I think the judgment should be affirmed.

SHERWOOD, J., delivered a dissenting opinion, in which, after stating the facts as agreed by the parties and found by the court, he stated his grounds of dissent, in substance as follows: The plaintiffs having the property in question in their possession, and claiming to be the owners thereof, gave it into the custody of the defendant carrier for transportation to Detroit, and it was its duty to deliver it there to them, or to their order. The common-law liability of a carrier of goods is the liability recognized in this state. Carriers of freight are liable, whether they are careful or not, for any act of omission or damage not caused by the act of God or of the public enemy: *Michigan Central R. R. Co. v. Ward*, 2 Mich. 538; *Michigan Central R. R. Co. v. Hale*, 6 Id. 261; *McMillan v. Michigan Southern etc. R. R. Co.*, 16 Id. 79; 93 Am. Dec. 208; *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Id. 546; 31 Am. Rep. 321. The statutes of this state impose the liability of common carriers upon the defendant, and it is not permitted to lessen that liability, except by a written agreement to that effect signed by both parties: *Howell's Stats.*, sec. 3328; *McMillan v. Michigan Southern etc. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Michigan Southern etc. R. R. Co. v. Shurtz*, 7 Mich. 515; *Buckley v. Great Western Ry Co.*, 18 Id. 121; *Cleveland etc. R. R. Co. v. Perkins*, 17 Id. 294. A carrier in possession of the consignor's goods has the same power and authority to protect and preserve them that the owner has, and it is his duty to use all the means that human agency can command to give such protection; and it is only after he has exhausted those means that he can be heard in his defense against the liability the common law casts upon him if injury or damage ensues. In this case, *prima facie*, the sheriff had no more right to enter the car and take these goods than had any other trespasser. The doctrine stated in *Gibbons v. Farwell*, 63 Mich. 344, so far as it has any bearing upon this case, is against the defendant. The learned judge, after quoting from the opinions in *Grand Rapids etc. R. R. Co. v. Huntley*, *supra*, and in *Michigan Central R. R. Co. v. Hale*, *supra*, in reference to the nature and extent of the common carrier's liability, concluded his opinion as follows: "The sheriff who took this property from the defendant had no more right, so far as this record shows, to take the same than any other citizen of Montcalm County. The defendant suffered the property to be taken from the carrier by a trespasser, and this brings the case clearly within the liability of the undertaking, and entitles the plaintiffs to a recovery. The judgment at the circuit court should be reversed, and a new judgment entered for the plaintiffs for the value of the property as found by the court, with costs of both courts."

COMMON CARRIER WHO HAS RECEIVED GOODS without the consent of the owner, express or implied, to their delivery cannot retain them against the latter for transportation charges: *Flick v. Newberry*, 1 Doug. 1; 40 Am. Dec. 23, and note as to carrier's right to retain goods as against the owner, where possession was not received from him.

WHERE A CARRIER ALLOWS AN OFFICER TO TAKE GOODS which the carrier is carrying, it is no defense, in an action for trover against the carrier, to show that the goods were taken by an officer, unless it be also shown that the officer had a legal right under his writ to take them: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301.

COOPER v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[66 MICHIGAN, 261.]

RAILROAD COMPANY IS GROSSLY NEGLIGENCE IN BACKING ITS TRAINS ACROSS MAIN STREET in a village, without a brakeman at the rear end as a lookout, and ready, in case of danger, to apply the brakes, and thus prevent collision or accident.

NON-EMPLOYMENT OF WATCHMAN AT CROSSING IMPOSES ON RAILROAD COMPANY DUTY of observing additional care in operating its trains across the street, to prevent accidents, even though the fact that it employs no watchman cannot be imputed to it as negligence.

CHILD CROSSING RAILWAY TRACK AT HIGHWAY IS NOT TRESPASSER, and it is not conclusive evidence of contributory negligence on her part that she stepped upon the track immediately after a train passed without looking up the track to see whether or not another train was following it, going in the same direction. Persons approaching railroad crossings are generally required to look and listen for approaching trains; but it would be unreasonable to apply this rule under all circumstances, without regard to the condition of things at the time.

CHILD OF TENDER YEARS IS NOT REQUIRED TO EXERCISE SAME DEGREE OF CARE and circumspection that is required of an adult.

TESTIMONY OF PECUNIARY CIRCUMSTANCES OF PARENTS IS ADMISSIBLE in an action against a railroad company for the negligent killing of a child.

ERROR IN ADMITTING IN EVIDENCE "ENGLISH TABLES" TO SHOW AVERAGE DURATION OF LIFE, based upon experience, at certain ages, instead of the American experience as shown in the Michigan statutes, is not prejudicial to the defendant in an action against a railroad company for the negligent killing of a child, where such tables show a less probable duration of life than the American experience.

EXTENT OF RECOVERY IN ACTION FOR NEGLIGENCE KILLING OF CHILD. — In an action against a railroad company for the negligent killing of a child of eleven years of age, the recovery of the parents should be limited to compensation for the loss of the services of the child during her minority, and an instruction to the jury that they might further take into consideration such other pecuniary benefits as the parents might reasonably be expected to realize had she lived for the balance of her probable duration of life, not exceeding theirs, is unsatisfactory, as permitting the jury to speculate upon contingencies too remote and uncertain. But if the verdict returned is no greater than the jury might have found had the objectionable part of the charge not been given, it will not be disturbed, no error prejudicial to the defendant appearing.

RULE ALLOWING DAMAGES TO BE BASED ON CONTRIBUTIONS TO PARENTS NOT APPLICABLE IN CASE OF VERY YOUNG CHILD. — In an action to recover for the death of a child, where the parents are the persons entitled to damages, the rule that their damages may be estimated upon the customary contributions of the deceased, proven before the jury, is not applicable in the case of a very young child who has never made any contributions, and when it is impossible to show that she ever will make any.

CASE. The opinion states the facts.

Weaver and Weaver, George C. Greene, and O. G. Getzen-Danner, for the appellant.

Keightley and Knowlen, for the plaintiff.

CHAMPLIN, J. On a bright, cold morning in January, 1886, Betsey M. Kisler, a little girl of eleven years of age, started for school in the village of White Pigeon. She was residing with her grandmother, whose house was situated south of defendant's railroad. The school-house was on the north side of such railroad, and a considerable distance therefrom.

Kalamazoo Street is the main thoroughfare crossing defendant's road in the village of White Pigeon, over which those who reside south of the road pass in reaching the main part of the village. Defendant's road runs nearly east and west at this point, curving slightly to the south as it proceeds west. There are three tracks crossing Kalamazoo Street,—a main track, which lies farthest to the north, and two side-tracks. Three freight trains had arrived at the station on the morning in question. No. 68, headed east, on the main track; No. 86, a local freight, also headed east, occupied the side-track called the "warehouse track"; No. 69 next arrived, headed west, on the main track.

At the arrival of No. 68, the engineer placed the engine in charge of the head or front brakeman, while he and his fireman went to breakfast. The rear brakeman was left upon the train. After the engineer and fireman left the train, the head brakeman, acting as engineer, proceeded to do some switching, and left some cars on the side-track, and had come back and attached the engine to the balance of the train, which then consisted of the engine, tender, two box-cars, and the caboose; and while standing near the water-tank, the conductor from No. 69, which had in the mean time left the main track, and taken a switch east of Kalamazoo Street, requested those in charge of No. 68 to pass east of his train on the main track, so as to let him pass to the west, as the local freight wished to use the track he was on. Thereupon the conductor of No. 68 left the train, and went to the station, and the head brakeman, acting as engineer, with the rear brakeman occupying the forward platform of the caboose, proceeded east a sufficient distance to allow No. 69 to back upon the main track to the west of No. 68. As soon as No. 69 had taken the main track, they proceeded west, crossing Kalamazoo Street, and No. 68 at once followed, backing towards the station. The

position of the brakeman was as before stated. At the time they crossed Kalamazoo Street, the train was moving a little faster than a man could walk. It was propelled by the momentum given it by the engine when it first started to back, the steam having been shut off several rods east of Kalamazoo Street. There was no lookout or brakeman upon the rear end of the train as it backed towards the station. After No. 69 had crossed Kalamazoo Street, the school-girl stepped upon the main track, and stood between the rails, looking at the receding train, when she was struck by the caboose of train No. 68, and run over and killed.

The main questions in the case are the negligence of the defendant, and the contributory negligence of the intestate. Questions of minor importance will be considered later. The main questions arise under the request of the counsel for defendant to instruct the jury to find a verdict in favor of his client.

There was sufficient evidence to be submitted to the jury from which they could find defendant's negligence. Indeed, it was gross negligence in defendant to back its train across a thoroughfare like Kalamazoo Street, in a village, without a brakeman at the rear end as a lookout, and in readiness, in case of danger, to apply the brakes, and thus prevent collision or accident. It must be remembered that the defendant employed no watchman at this crossing, and while that fact cannot be imputed as negligence, yet it cast upon the defendant the duty of observing additional care in operating its trains across the street to prevent accidents. Can any rational being doubt that if the brakeman had been upon the rear platform of the caboose he would have seen the child in time to have stopped the train, propelled simply by its own momentum, at a rate of speed but little faster than a person walks? A person in that position, without applying the brakes at all, and animated with a desire to save life, could have leaped from and outstripping the train rescued the child from danger. Both the engineer and brakeman claim that they kept a lookout, and did not see the child, which is some evidence from which it might be inferred that the brakeman at least was not in his proper position.

As to contributory negligence on the part of the plaintiff's intestate: Defendant's counsel admit that the rule is well settled as to the degree of care expected and required of children; that the age and intelligence of the child is always an

element to be considered. But while conceding this, counsel insist that with this limitation it becomes as much a question of law, under a given statement of facts, as though the acts of an adult were being considered; that if the child has reached that age that, under the existing conditions of things, it must have known that it was dangerous to be or stand in a certain place, or to do a certain thing, then the child may be and is chargeable with contributory negligence, the same as a grown person would be. Many cases are cited in brief of counsel as instances where children have been held accountable to the doctrine of contributory negligence. And counsel contend that the evidence shows that the child was a trespasser upon the grounds of the company, and that it owed her no duty, and is liable only for gross negligence.

In this view I do not agree. The evidence was conflicting as to whether the little girl was proceeding north on her way to school, which was the theory of the declaration, or whether she had crossed the track, and had turned back and went between the rails from the north. Be it either way, she could not be considered a trespasser. She was in the highway, and no person has testified, if she did turn back, with what intent she did so. She may have bethought herself of something which may have required that she should return to her home. If so, and she desired to cross, she could not do so until the cars had passed. Defendant showed conclusively that No. 86 was standing across the street upon the warehouse track, waiting for 69 to get out of its way. In that case, she waited until 69 passed, and then, as she started, she saw 86 blocking the street in front of her; and, naturally enough, she stepped forward, and waited for 86 to get out of the way, and while doing so, looked toward the receding train, without looking or expecting another train to follow in its wake so soon. The testimony shows that the bells on the different engines were ringing, and there evidently was much confusion and noise, which might well distract the attention of an older person than she. Besides, few persons would, without reflection, consider it unsafe to step upon the track immediately after a train had passed, and was still going from them. She had seen No. 68 start east, and might naturally conclude that it was well on its way east, instead of following a train on the same train back. These were circumstances which the jury would consider in passing upon her want of care.

It is not conclusive evidence of contributory negligence in

the child that she did not look up the track towards the east before venturing to cross. It is a wholesome precaution for persons approaching the track of a railroad to look both ways, and to listen for approaching trains, and it is what is generally required; but it is not a rule of universal application. Every case must depend upon its own circumstances, and it would be unreasonable to apply such rule, under all circumstances, without regard to the condition of things at the time.

A child of tender years is not expected or required to exercise the same degree of care or circumspection as an adult. The charge of the learned judge upon this branch of the case was as favorable to the defendant as it had a right to expect. He said:—

“If you believe, from the evidence, that the deceased had crossed the track to the north in safety on her way to school, and had been standing there near the track, and had seen the train switched and running back and forth, and knew there was a train east of Kalamazoo Street, and she then stepped south upon the track, and did not look or listen or use ordinary care, under all the circumstances as you may find them, to ascertain whether a train was approaching from the east, and stood on the track with her face to the west, and if you find the bell was ringing and the train moving slowly, then she was guilty of contributory negligence, such as precludes the plaintiff's recovery in this case.

“In this connection, I will say, however, that the same degree of care is not required of a child as of an adult person; and if you find that she did not know the train was on the track east of her, and used such care in looking and listening, and stepping upon the track, as would reasonably be expected of a child of her sex, age, and intelligence, under all the circumstances surrounding her at the time, she cannot be said to have been guilty of contributory negligence. But if she did not use such ordinary care in looking and listening, and in going upon the track, as a girl of her age and intelligence would reasonably be expected to use under the circumstances, and if she neglected to use such care as contributed to her danger, she was guilty of contributory negligence, and the plaintiff cannot recover, even though you may find the defendant was negligent.

“The degree of care to be exercised must always be commensurate to the danger to which the person is liable to be exposed; and you are instructed, as matter of law, that it

was not the exercise of that due care and prudence which deceased was bound to exercise, if she stepped upon the railroad track without looking and listening, in some degree or manner, to ascertain whether it was safe to do so; and if she did go upon the track without such precaution, and if it was the approximate cause of her injury, the verdict must be for the defendant.

"It was the duty of the deceased to use her eyes and ears, as before stated, to such a degree as such a child would reasonably be expected to do, with such surroundings, in approaching a crossing; and if she neglected to do so, there can be no recovery in this case, even though the train was negligently run, and equipped with an insufficient crew."

Taken as a whole, this instruction is not objectionable, and the defendant has no cause for complaint.

The testimony showing the pecuniary circumstances of the parents of the child was admissible: *Hoppe v. Chicago etc. R'y Co.*, 61 Wis. 357, 369; *Opsahl v. Judd*, 30 Minn. 126; *Ewen v. Chicago etc. R'y Co.*, 38 Wis. 613; *Barley v. Chicago etc. R. R. Co.*, 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169; 89 Am. Dec. 418. And see *Chicago etc. R'y Co. v. Bayfield*, 37 Mich. 215, where such evidence is held admissible in cases where the persons killed were very young children.

It was also proper to admit in evidence tables of standard authors showing the average duration of life, based upon experience, at certain ages. Dr. Farrs's tables were received in evidence. These tables were constructed from the official records of the registrar-general for England and Wales, and are known as the English tables. They differ from those based upon the American experience, which are shown in section 4245 of Howell's Statutes. Inasmuch as the probable duration of life, as shown by Dr. Farrs's tables, is less than that shown by the American experience at the ages of thirty-five, forty, and eleven years, respectively, the error is not one that was prejudicial to defendant.

Upon the subject of damages, the court instructed the jury as follows:—

"If you find for the plaintiff, you may find such damages as you shall deem fair and just with reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages. In this case, the father and mother of the deceased are the persons entitled to pecuniary benefit; and if you find for the plaintiff, you must be

governed by the reasonable expectation of pecuniary benefit to the parents from the continuance in life of the deceased. In this connection, it is proper for you to consider the dependence the parents might reasonably place on the daughter being their support and assistance in the future. But you cannot allow for the loss of services beyond the age of twenty-one years. But you may take into consideration such other pecuniary benefits as the parents might reasonably be expected to realize had she lived for the balance of her probable duration of life, and not longer than theirs, of course.

"If you find that the plaintiff is entitled to recover in this case, the damage which you should give should be such a sum as fairly represents the value or chance of pecuniary benefit which the father and mother lose by the death of their daughter; and in estimating such chance, you must take into consideration the uncertainty of the continuance of life of the deceased if she had not met with this accident, the chances that, even during the continuance of her life, whether for a longer or a shorter period, she would not have been able to earn money continuously or care for them continuously. In other words, you must take into consideration the uncertainty of life, the uncertainty of health, the uncertainty of her continuous earnings, and the uncertainty as to the disposition of her earnings which she might have made had she lived, with the uncertainty whether she would have or not cared for them continuously, or have cared for them at all.

"Such a sum can only be recovered as the evidence shows the father and mother would have realized from the care bestowed upon them by the daughter if she had lived, or what they would have realized from the money she would have earned if she had lived, and the value of her services up to the age of twenty-one if she had lived. In estimating how much pecuniary benefit the father and mother would probably have derived from the care of the deceased had she lived, you are to recall the fact that a part of her labor and earnings would have been consumed in support of herself. The damages should be estimated on a money basis; that is, you should find out how much this pecuniary loss was to these parents, and should be confined to such pecuniary loss as the proof shows the father and mother have suffered by the death of their daughter. Such sum only can be recovered as the proof shows they would in all probability have received had this accident not have happened. The jury should bear in mind

that the damages awarded must be compensation for the plaintiff, and not punishment for the defendant. In estimating the damages, you are not to take into consideration the grief and mental pain suffered by the father and mother on account of their daughter's death.

"As to the term of service, you should consider the probable value of the services of the deceased, or what would have come to the parents from the time of her death until she arrived at the age of twenty-one years, and the probable care and pecuniary benefit they would have received for the balance of her probable life, less the expenses of her maintenance during the same time. And in this connection, it is proper for you to take into consideration the testimony in the case surrounding the deceased of having lived with her grandmother for some years, and whether or not she would have continued to live with her grandmother, and if so, upon what terms, or whether she would have contributed to the support of her grandmother or her own father and mother. Such sums only can be awarded as the proof fairly shows would have come to her father and mother from the daughter in money, care, and services in case she had lived."

The particular objection urged against these instructions is, that the damages are not limited to the minority of the child, covering a period of ten years. Compensation for loss of services during her minority, he concedes, is proper for the consideration of the jury; but he insists that the jury may not take into consideration such other pecuniary benefits as the parents might reasonably be expected to realize had she lived for the balance of her probable duration for life, not longer than theirs. What other pecuniary benefits the parents might reasonably be expected to realize, the learned judge does not explain to the jury. He tells them that they should give such damages as fairly represent the value or chance of the pecuniary benefit which the father and mother lose by the death of their daughter.

Here was a broad field of chance and probabilities laid open before the jury through which they could roam without limit. They were permitted to speculate upon the future, and consider the probabilities or the possibilities of its unknown and unknowable contingencies; to consider and guess at what might occur had the daughter not been killed, and had lived to an age measured by the probable duration of the life of a person eleven years of age. They were given the *data* of a

healthy girl of eleven years of age, born of poor parents, living with and being cared for by her grandmother; and from this they were required to solve the mighty problem of a life whose future was unknown, and from its unfathomable depths to figure out the chances of pecuniary benefits the parents of that child would have received had she lived past the age of majority.

The jury, of course, must determine whether she would remain single or marry. If she married, she might marry a husband in the same humble walk of life as herself. He might be without means, or he might have a competency of this world's goods; and the daughter might or might not be in a position, and have the means and desire, to make presents to her parents to a greater or less extent. Or she might marry a millionaire, and be able and willing to supply her parents with all the luxuries of life. Or she might remain single, and be compelled to toil from morning until night to earn her livelihood. Who can place a pecuniary estimate upon chances such as these? It is evident at a glance that any estimate or value placed upon events so uncertain must be without any satisfactory basis to rest upon.

The statute authorizes the jury, in every case of this kind, to give such amount of damages as they shall deem fair and just to the persons who may be entitled to the same when recovered. Under this statute, the jury are not warranted in giving damages not founded upon the testimony, or beyond the measure of compensation for the injury inflicted. They cannot give damages founded upon their fancy, or based upon visionary estimates of probabilities or chances. The rule of damages in actions for torts do not apply to actions of this kind. The statute gives the right to damages; but it has been held, with rare exceptions, that they must be confined to those damages which are capable of being measured by a pecuniary standard: *Cooley on Torts*, 271, and cases cited in note 2.

In actions brought under the statute, where the parents are the persons entitled to damages, if the evidence shows that the deceased had been in the habit of making contributions from his own means to his parents, their damages might be based and estimated upon the customary contributions of deceased proven before the jury: *Chicago etc. R'y Co. v. Bayfield*, 37 Mich. 205. But this rule is not applicable in the case of a very young child who has never made any contributions, and who it is impossible to show ever will.

The question is, whether the jury were misled by the charge as to what they might consider in estimating the damages. If they were not, the judgment should not be reversed for that error. The jury returned a verdict for \$1,550. We cannot see that this verdict was larger than the jury were authorized under the statute to render, nor greater than they might find under that portion of the instructions of the court relating to the value of the earnings or services of the child until she reached the age of twenty-one, to which no exception is taken.

Upon the whole record, we are satisfied that no error has been committed prejudicial to the defendant. The judgment is affirmed.

RAILWAYS—NEGLIGENCE.—Where, in action for negligent injury to a child by a railway train, three persons on the train said it was their duty to watch, and two of them said they were in positions where they could see, and did not see the child on the track, and three other witnesses swear the child was upon the track, the time of the accident being broad daylight, such evidence is conclusive proof of reckless negligence on the part of the railway company: *Battisill v. Humphreys*, 64 Mich. 514.

RAILWAYS—NEGLIGENCE AS TO CHILDREN UPON TRACK.—Compare the following recent cases, which discuss more or less fully the questions decided in the principal case: *Battisill v. Humphreys*, 64 Mich. 494; *Battisill v. Humphreys*, 64 Id. 514; *Ecliff v. Wabash etc. R'y Co.*, 64 Id. 196.

RAILWAY TRACKS.—It is the duty of all persons who go upon or across railway tracks to stop, look, and listen for approaching trains, and a want of such care on the part of one who may be injured while upon or crossing the track constitutes negligence: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813; *Duane v. Chicago etc. R'y Co.*, 72 Wis. 523; 7 Am. St. Rep. 879, and note 885; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note 174.

RAILWAYS—CARE TO BE EXERCISED.—Greater care must be exercised by railway companies in running through populous towns than under other circumstances: *Troy v. Cape Fear etc. R'y Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; *Curley v. Illinois etc. R'y Co.*, 40 La. Ann. 810; *Nuzum v. Railway Co.*, 30 W. Va. 223.

KEAN v. DETROIT COPPER AND BRASS ROLLING MILLS.

[106 MICHIGAN, 277.]

NEGLIGENCE IN EMPLOYING FOREMAN ADDICTED TO EXCESSIVE USE OF INTOXICATING LIQUOR. — It is negligence and want of ordinary care for a manufacturing company to place men who are accustomed to the habitual use to excess of intoxicating liquor in charge of business requiring the control and direction of persons operating dangerous machinery; and for any injury to the employed under the charge of an intoxicated foreman, resulting from such cause, when the company has knowledge of such intemperate habits, it must make reasonable compensation.

EVIDENCE OF INTEMPERATE HABITS OF FOREMAN IS ADMISSIBLE in an action to recover damages for an injury received by an employee under such foreman while engaged in wiping dangerous machinery under the orders of the latter.

WHERE FOREMAN AND HIS ASSISTANT HAVE EQUAL KNOWLEDGE OF DANGER accompanying an act about to be done, even if the foreman requests its performance, and injury ensues to the assistant, the employer cannot be made liable. Notwithstanding the request in such case made by the foreman, the assistant can comply or not as he chooses, and if he does comply, he takes his chances of the perils surrounding the situation; and in such a case, where there is no dispute upon the facts, there is no occasion to go to the jury to determine whether the assistant ought to have obeyed the order of the foreman or not.

SERVANT ASSUMES NOT ONLY USUAL AND ORDINARY RISKS AND PERILS of his master's service when he enters it, but also such other risks as become apparent by ordinary observation.

CASE. The opinion states the facts.

C. A. Kent, for the appellant.

Don M. Dickinson, for the plaintiff.

SHERWOOD, J. The defendant in this case is a manufacturer of copper and brass materials, having its place of business in the city of Detroit, and in its works has a machine called the "breakdown rolls," the purpose of which is to reduce bars of the metal to thin plates. The rolls are about ten inches in diameter and forty inches long, and run together at a speed of about thirteen revolutions a minute. When used they are placed from an eighth of an inch to an inch apart, according to the thickness of the plate desired to be made. Oil is used upon the rolls, and they have to be cleaned from one to three times a day. In attempting to clean the rolls from the wrong side, the plaintiff's hand was caught and drawn in between them, in consequence of which he lost the four fingers of his right hand. It is for this injury thus re-

ceived the plaintiff seeks to recover of the defendant in this action.

He states his case in two counts. In the first it is alleged "that plaintiff was an ordinary laborer engaged to pile scraps, and that he was ordered, against his will, to work as an assistant on the breakdown rolls, a dangerous employment, of the danger of which he was not informed, and while in such employment was directed by his foreman to wipe the rolls on a side which must certainly result in accident, and that the accident occurred in such wiping without plaintiff's fault."

The second count states "that plaintiff was employed as an assistant on a dangerous piece of machinery, under a foreman who was intemperate and incompetent, and that this foreman ordered the cleaning of the rolls, which would certainly result in accident," etc.

The verdict was for the plaintiff on both counts, awarding him the sum of three thousand dollars. The defendant brings error.

The testimony on the part of the plaintiff was given by himself, the foreman of the mills, and eight other employees of the company, so far as shown by the record, which purports to contain it all.

Plaintiff testified in his own behalf as follows:—

"I am twenty-eight. Was born in Ireland. Came to this country at twelve. Worked on a farm. Sailed some. Had no trade. Never was in a machine-shop or rolling-mills until I worked for defendant. Went to work for defendant in January, 1882. Mr. Duxbury was then foreman of the shop. My business was to pile copper and brass scrap. Had nothing to do with the machinery, nor did I have to go near it. My wages were \$1.40 per day. Was never directed to go about the machinery. I was injured between nine and ten, December 28, 1882. I was hurt at the breakdown rolls. They are very large. I went to the shop the morning I was hurt, and the first thing there was some wire bars we rolled. After that, Kelly, the foreman of the breakdown rolls, scoured the rolls, and said to me, 'I want you to wipe them off.' Then he went back to the back end of the shop. So I picked up some rags and wiped the rolls off on the side I always worked. When I thought they were clean enough, I started down the shop after the bars of metal, which had been run out of the furnace, and were on the floor. As I started, I saw Kelly coming from the back-door. When I got round the rolls and got to the shears,

I met Kelly. Kelly pointed to the rolls and said, 'I want you to clean those rolls better.'

"Q. On which side did he point? A. He pointed to the rolls.

"Q. On which side? A. He pointed to the side he was working on.

"Q. That was different from the side you had wiped on? A. He pointed to the rolls, and I went right up with him,—right side by side.

"Q. Tell what he said. A. He said, 'I want you to wipe them off better'; and I took the rags, reached right over on the platform, where we put the metal on, took the rags, and wiped the rolls off, and he stood right alongside of me. He took hold of the screw that I supposed belonged to the rolls. I went to wipe off the top rolls, then I went to wipe off the bottom rolls, and I went right in.

"Q. Was that the same side on which you had wiped the rolls before that morning? A. No, sir.

"Q. On a different side? A. Yes, sir.

"Q. Did Kelly stand right by you when he told you to wipe those off? A. Yes, sir; we were both facing the rolls, and on the side where my hand went in.

"I could not tell exactly how long before that I went to work on the rolls. I was put on the rolls, off and on. The first time I was put on the rolls, Dick Jordan was sick, and I was put there until he came back. I was there only temporarily. My work on the rolls was to get the metal from the floor and put it on the platform. Then, as the metal was passed to me, I threw it on the carts or the platform. I did not do the work of feeding the rolls; I only had the laborer's part. Jerry Howe, foreman of the shop, set me to work on the rolls with Kelly. It was a few days before the accident. Before that, I was working at the pickling-tub with Al. Krantz. When Howe asked me to work on the rolls, I told him that I did not want to work on the breakdown rolls; I wanted to stay where I was. I told him that Kelly did not use me right. He said, 'I want you to go to work on there.' So I expected I would be discharged if I did not work with Kelly, and in a few days I got hurt.

"Q. On looking at the rolls, could you see whether they were moving or not? A. Yes, sir; I could see that they were moving all right, but I did not know the nature of the rolls, or I would not have wiped them on that side. If I had been

told anything about the rolls, I would have stopped when I went upon that side; but I did not know I would be drawn in; did not know the nature of it; was never told anything about it. I had never wiped the rolls on that side before.

"It was grease I had to wipe off the rolls. Kelly put it on. I can't tell how long after I attempted to wipe the rolls that my hand was drawn in; it might have been a few minutes. My hand was then injured the way it is now. After the accident I was taken to the office, and then to the hospital, where I staid all that winter. In the spring I went back to the shop, and was put in the wash-room, rinsing out metal. I staid there a while, but was afraid I would catch cold. I then went to C. H. Buhl's hardware store, as a night-watchman. It did not agree with me, and I went back to the shop, when Howe told me they had nothing for me to do."

On cross-examination, witness testified: "I did not continue to work steadily in the shop after I began until I was hurt. I was laid off a good many times. Every day I was there I saw and passed by the rolls. I can't tell when I first worked on the rolls. Duxbury first told me to work on them. I worked on the same side I always worked until I was hurt. I can't tell whether or not I worked on them as early as May, nor whether I worked on them at that time a month. I remember Jordan's being sick. I worked on the rolls while he was sick. When he came back I objected to working on the rolls longer, but Byington wished me to keep the place, and so I kept it. I went back to rolls in July, but can't say whether or not I was continuously working on the rolls from that time. My duties on the rolls were, I caught the metal as it came through the rolls. I cleaned the rolls whenever the foreman got through scouring them. If oil was put on, I might have to clean them twice or three times; if it wasn't, I cleaned them off in the evening once a day, for the whole time. I can't tell how many months I worked continuously on the rolls, for I was changed off and on. I was never told anything about the nature of the rolls. I don't remember whether or not I ever complained to the officers of the company about Kelly."

Redirect: "I cannot exactly say how long, at any one time, I had served on these rolls. I had served more than two weeks at a time. I was called to work on them a good many times, how many I can't say, but I was never put permanently on them until the last time, less than a week before I was hurt.

I had not been working on the rolls for six weeks previous to the time when I was last put on them."

Recross: "I cannot tell whether I worked on the rolls as much as six or eight months before the accident. I might have worked on them a month at one time, but I can't tell how many times."

Several of the other witnesses testified to the defendant's foreman, Kelly, being of intemperate habits; that on one or two occasions he had been permitted to give directions when under the influence of liquor, and had been known to keep liquor at the rolling-mills; and witness Duxbury testified on the part of plaintiff that he was foreman at defendant's rolling-mills fifteen months during 1881 and 1882, and knew Kean and Kelly, and saw the latter come in the shop intoxicated, and sent him home. Never saw him afterwards under the influence of liquor, "but saw him go out frequently into saloons, and I notified the superintendent, and for this he was discharged." He further testified that "the only danger about the rolls is that of getting caught between them. . . . It is never necessary to wipe the rolls on the front side. Wiping the rolls is the most dangerous work connected with the rolls, and there is no danger if you wipe them on the right side. . . . A man who had been employed as Kean had been, if put on the rolls, ought in a week to learn every danger connected with the rolls, and after that I should not think it would be necessary to tell him anything."

The defendant's testimony tended to show that the plaintiff worked in defendant's mills from the month of February to the month of December, 1882, both inclusive, and that he worked from ten and one half to twenty-five and one quarter days in each month during said period.

Further evidence was also given tending to show that plaintiff began working on the rolls in April; that he worked there occasionally in April, May, and June; that he began to work on said rolls steadily in July, and worked there until the accident,—all the time he worked in the shop when the mills were in use, save two weeks; that prior to the accident Kean was commanded by his foreman, Kelly, never to clean off the rolls on the front side; that on the day of the accident, Kean, in cleaning off the rolls on the proper side, had left them dirty, and that, in consequence, Kelly ordered him to finish cleaning them off; that at this time Kelly and Kean were about thirty-five feet from the rolls; that Kean went alone back to

the rolls; that Kelly noticed him cleaning on the front side, and started to stop him, but that before he reached Kean the accident happened; that Kelly turned up the screw after the accident for the purpose of releasing Kean; that Kelly was discharged by defendant July 7, 1882; that he was re-employed November 9, 1882, on promise of future good conduct; that from that time until after the accident he was never under the influence of liquor in the defendant's mills; that on the day and at the time of the accident he was perfectly sober, and assisted in releasing plaintiff from the rolls, and had him in his subsequent care until taken to the hospital.

The record states the foregoing is the substance of all the testimony given for the defendant.

Thirteen errors are assigned upon the various proceedings had in the case at the circuit. Counsel for defendant, however, reduces these to four, which, stated in his own language, are as follows:—

"1. The evidence of intemperance in the foreman, Kelly, should have been rejected, and the second count, based on the charge of such intemperance, should have been taken from the jury.

"2. The court should have charged that there was no evidence that plaintiff was ordered to clean the rolls on the wrong side by his foreman.

"3. The court should have charged that plaintiff must have known that it was dangerous to clean the rolls on the wrong side, and that no command of his foreman excused his running the risk.

"4. The court erred in allowing counsel for the plaintiff to discuss to the jury his theory of what the law ought to be, and the conduct of the Michigan Central Railroad Company."

The first proposition relates to the intemperance of Kelly, and its effect upon his capacity to properly discharge the duties of his position. The proof clearly shows that Kelly, the foreman of the defendant, was a man of intemperate habits, accustomed to get intoxicated and drunk to such an extent as to incapacitate him to properly discharge the duties of his position; that this was so understood by the defendant; and for that reason its superintendent discharged him from its service. It also appears that this habit of Kelly had for a long time been known to those in charge of the defendant's business.

There can be no question, I apprehend, at this late day, but that it must be regarded as negligence, and a want of ordinary care, in any of our large manufacturing institutions, to place men who are accustomed to the habitual use to excess of intoxicating liquor in charge of business requiring the control and direction of persons operating dangerous machinery, and that for any injury arising to the employed under the charge of an intoxicated foreman, arising from such cause, when the company has knowledge of such intemperate habits, it must and should make reasonable compensation. Intemperance was an agency tending to disqualify a man for the position Kelly held.

To what extent it had affected him in that direction, and what was his condition in this respect when he gave the direction to plaintiff claimed on the day and occasion of the accident, were questions for the jury, and the evidence offered of Kelly's habits was, in my judgment, properly received, and the court committed no error in rejecting defendant's first proposition.

The second proposition required the court to instruct the jury that there was no evidence of the order of defendant, by its foreman, to plaintiff, to clean the rolls on the side he was injured. The testimony of Kean was to that effect. The defendant's direction, if any, to the plaintiff, on the occasion of the accident, was given by Kelly. The testimony of the plaintiff shows that he had, on the day of the accident, been told by Kelly to wipe off the rolls, and the plaintiff did so in the usual way, and left them; that he was met by Kelly about thirty-five feet from the rolls (as the other testimony shows), and Kelly told him, "I want you to wipe them off better [meaning the rolls]"; that he pointed to the rolls on the front side, and said, "I want you to clean those rolls better"; and that Kelly went with him to the front side of the rolls, and that he stood right by the side of him when the plaintiff took a rag and reached over on the platform and wiped the rolls; that Kelly stood right by the side of him at the time, and took hold of the screw which held the rolls nearly together in their place; and the plaintiff then says, "I went to wipe off the top rolls, then I went to wipe off the bottom rolls, and I went right in." He further says at this time, "We were both facing the rolls." Some of the testimony of plaintiff's other witnesses is corroborative of the statements of the plaintiff. It also appears, by the testimony

of Duxbury, it was the plaintiff's duty to obey the demands and direction of Kelly.

Whether the plaintiff was directed by Kelly, or from a fair interpretation of what Kelly did and said on that occasion there was a direction to Kean to wipe the rolls on the front side, were questions for the jury, and were very properly left to them to determine, in the view I take of the testimony. There was testimony from which they might find such direction by Kelly, and the ruling of the court was correct upon this proposition.

The third proposition is one of more difficulty. It requested the court to charge that the plaintiff must have known the danger to which he exposed himself in obeying Kelly's order, if he gave it, in attempting to clean the rolls on the wrong side, and that no command of the foreman excused the plaintiff's running such risk. There is no dispute as to the danger the plaintiff subjected himself to in attempting to clean the rolls on the wrong side, and it is difficult to understand, if the plaintiff was twenty-eight years old, and a man of ordinary ability and understanding (and it is not claimed he was otherwise), how he could have been ignorant of the danger which surrounded this machine after working upon and about it the length of time he did. It is difficult to conceive such to be the fact.

The testimony for the defendant, which is not disputed, shows that the plaintiff worked most of the time for nine months on and about this machine before the accident occurred to his hand, and he says himself that every day he was there he saw and passed by the rolls; that his duties on the rolls were to catch the metal as it came through the rolls, and clean the rolls whenever the foreman got through scouring them; and that he cleaned them once a day the whole time he worked upon them, and sometimes two or three times a day, and always cleaned them from the same side until the day he was injured. He further states that Duxbury first told him to work upon them.

Duxbury's testimony is to the effect that the only danger about the machine is that of getting caught between the rolls; that it is never necessary to wipe them from the front side, and that there is no danger if they are wiped on the right side; that no one who knows anything would try to wipe them on the front side; that a man employed as Kean was ought in a week to learn every danger connected with the rolls, and after

that time it would not be necessary to tell him anything; that if the foreman should tell an assistant to wipe the rolls off, he would be expected to do so on the back side; and he further testified that a man ordinarily intelligent, by wiping the rolls off on the proper side, ought to learn without instruction the danger of wiping off in front, in a week or ten days.

The plaintiff, however, testified: "I could see by looking at the rolls that they were moving all right, but I did not know the nature of the rolls, or I would not have wiped them on that side. . . . I did not know I would be drawn in. I did not know the nature of it; was never told anything about it."

Upon the undisputed testimony, I think there can be no question but that the plaintiff was familiar with this machine, and I am not able to understand why he should not have known, as he stood in front looking upon those rolls turning rapidly in towards each other, catching and carrying a bar of copper an inch thick between them, and by the enormous pressure flattening it out into a thin sheet of metal not a half-inch thick, that from a like contact with the rolls, his hand, if caught and drawn in between them, would be crushed. Certainly, the peril, whatever it was, was plainly before him. He had but to look to be fully warned. There is no doubt but that, with proper care, the rolls could have been cleaned with safety. Such was the tenor of the testimony of plaintiff's witness Duxbury; but whatever there was of danger in doing it in this case was, I think, well known and apparent to the plaintiff when he made the venture. Had the danger been pointed out to him by all the other employees and agents of the company, it is difficult to see how it could be made plainer to him than it was as he stood there looking upon it.

If the experience the record in this case shows the plaintiff had with the machine was not a sufficient warning of the danger which he claims was unknown to him, it would hardly be expected that any specific instructions which the foreman or superintendent could have given would have furnished the plaintiff with better knowledge upon the subject, or would have been heeded by the plaintiff. The plaintiff does not say, in his testimony, that Kelly told him to clean the rolls on the front side at the time he received the injury, but stood by his side while he was doing it.

There was nothing in the superior position of Kelly at that time that made the danger any more apparent to him than to the plaintiff. He could judge as well as Kelly of the lia-

bility of his having his hand caught and taken between the rollers if he attempted to clean them from the front side. It does not appear that either of them had ever known or witnessed an accident of that kind; and I think, where both the foreman and assistant or helper have equal knowledge of the danger accompanying the act about to be performed, even if the foreman requests its performance, and injury ensues to the helper, the company cannot be made liable. Notwithstanding the request in such case made by the foreman, the servant can comply or not, as he chooses, and if he does, he takes his chances of the perils surrounding the situation: *Bell v. Western & A. R. R.*, 70 Ga. 566; *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 393; 18 Am. Rep. 412; *East Tennessee etc. R. R. Co. v. Duffield*, 12 Lea, 63; 47 Am. Rep. 319; *Baker v. Western & A. R. R. Co.*, 68 Ga. 706. Such I understand to be the law between the foreman and his helper when the former possesses no superior knowledge, and the dangers are apparent alike to both of them; and in such a case, where there is no dispute upon the facts, there is no occasion to go to the jury to determine whether the helper ought to have obeyed the order of the foreman, or not.

The plaintiff, when he entered into the service of the defendant assumed not only the usual and ordinary risks and perils of the service, but also such other risks as become apparent by ordinary observation: *Gibson v. Erie R'y Co.*, 63 N. Y. 449; 20 Am. Rep. 552; *Baltimore etc. R. R. Co. v. State*, 24 Md. 271; *Hutchinson v. Railway Co.*, 5 Ex. 343; *Illinois Cent. R. R. Co. v. Cox*, 21 Ill. 20; 71 Am. Dec. 298; *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 421; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Lee v. Detroit Bridge and Iron Works*, 62 Mo. 565; *Pittsburg etc. R'y Co. v. Devinney*, 17 Ohio St. 197; *Foster v. Minnesota etc. R'y Co.*, 14 Minn. 360; *Anderson v. Milwaukee etc. R'y Co.*, 37 Wis. 321; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; 4 Am. Rep. 364; *Michigan Cent. R. R. Co. v. Dolan*, 32 Mich. 510; *Cooley on Torts*, 542; 2 *Thompson on Negligence*, 976.

I think, under the circumstances of this case, the defendant's third proposition should be sustained, and the ruling of the court was error.

The fourth proposition refers to the remarks of Mr. Dickinson made in his closing argument to the jury. I do not think there was such a departure from the rules in what he said, urging upon the attention of the jury the reason and necessity

for them to be vigilant in the examination of the case, as to be subject to the exception taken, or in stating his understanding of the law, and what he regarded as defects therein upon certain questions raised, requiring thorough investigation and careful consideration of the facts.

For the injury received by this plaintiff, under the circumstances appearing upon this record, and undisputed, I do not think the defendant should be held liable.

The judgment should be reversed, and a new trial granted.

MASTER AND SERVANT—ASSUMPTION OF RISKS BY SERVANT.—An employer is not liable for injuries resulting from those dangers which are the subject of common knowledge, or which can be readily seen by common observation, because such risks are assumed by the servant: *Smith v. Peninsular Car Works*, 60 Mich. 501; 1 Am. St. Rep. 542, and note. Servants assume, not only the usual risks, but such as can be ascertained by ordinary observation: *Gibson v. Erie R'y Co.*, 63 N. Y. 449; 20 Am. Rep. 552; *Illinois O. R. R. Co. v. Coz*, 21 Ill. 20; 71 Am. Dec. 298; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; 4 Am. Rep. 364; *Stephenson v. Duncan*, 73 Wis. 404; 9 Am. St. Rep. 806, and note 810; *Rolsath v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637, and note 639; *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, and note 450; *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230. Compare the recent cases of *Hoffman v. Clough*, 124 Pa. St. 505; *Brown v. Brown*, 71 Tex. 355; *Wood v. Locke*, 147 Mass. 604.

MASTER AND SERVANT—FOREMAN GIVING DANGEROUS ORDERS.—When a foreman gives dangerous orders, a servant may or may not obey them, but by obeying he assumes the additional risks incidental thereto: *Bell v. Western etc. R. R. Co.*, 70 Ga. 566; *East Tennessee etc. R. R. Co. v. Duffield*, 12 Lea, 63; 47 Am. Rep. 315; *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 393; 18 Am. Rep. 412; *Fisk v. Central P. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note.

JENKS v. COLWELL.

[66 MICHIGAN, 420.]

TO SUBMIT TO JURY, AS QUESTION IN DISPUTE, MATERIAL FACT PROVED by uncontradicted testimony in the case is error.

CONDITION RETAINING TITLE IN VENDOR OF PERSONAL PROPERTY UNTIL PAYMENT IS MADE, EFFECT OF ON RIGHTS OF INNOCENT PURCHASER.—In Michigan, the right of a vendor of personal property upon a condition retaining title in himself until payment is made to follow it into the hands of third parties, or to sue them for its conversion, depends upon the good faith of the transaction; and where the purchase is made from the vendee in good faith, and without notice, under circumstances in which the original vendor must have known or contemplated that the property would be sold by his vendee and incorporated into or made part of the freehold, his rights will be made subservient to those of the innocent purchaser. A verdict should, therefore, be directed for the defendants in an action of trover to recover the value of machinery in their

mill, where it appears, from the evidence, that the plaintiffs, when they made to the millwright who built the mill for the defendants a conditional sale of the machinery upon condition that the title should not pass to the vendee until payment was made, knew that the machinery was purchased by the vendee for the purpose of placing it in the mill of the defendants, under a contract which bound him to so place it, and knowing that fact, obtained from the defendants, upon the vendee's order, the down payment for the machinery, and guaranteed its shipment, to be used in the mill, and where it further appears that the defendants had no notice or knowledge, when the machinery was placed in the mill, that the plaintiffs still claimed the title to it.

TROVER. The opinion states the case.

S. W. Vance, and O'Brien and Atkinson, for the appellants.

Elliott G. Stevenson, for the plaintiffs.

CHAMPLIN, J. On the third day of October, 1882, James A. Thompson entered into a contract with defendants to construct for them a mill-building on their premises in Backusville, Alcona County, and place therein a certain steam-boiler and machinery. Thompson was to furnish all the labor and all the machinery enumerated in the contract, and pay the costs of its transportation. The defendants were to furnish all the lumber, timber, and materials for the building and machinery. They were to pay Thompson \$4,112, as follows: One thousand dollars at the execution of the contract, and the balance when the mill was completed and in good running order.

Thompson had worked for the plaintiffs for some years, — five or ten. He was a millwright by trade, and had worked in their shops, and also on the road selling machinery; and being a millwright, he had permission from the plaintiffs to go at any time he could get a job outside, and then, when he came back again, he went to work for the plaintiffs, if he had not anything else to do. At the time of this contract with the plaintiffs he had not worked for them for a year or more.

After Thompson had entered into his contract with the defendants he went to plaintiffs, who were doing business under the name of the Phoenix Iron Works, at Port Huron, and entered into a contract with them for the purchase of the machinery in question, agreeing to pay therefor \$3,183.47, — \$500 down, and the balance, \$2,683.47, in twenty days, with interest, according to the condition of a promissory note executed by Thompson, — and when payment was fully made, they agreed to execute to Thompson a bill of sale of the prop-

erty. The contract contained this clause: "It being expressly understood that the title of the said above-mentioned articles, machinery, etc., shall not pass out of the said Phoenix Iron Works until the full sum hereinafter mentioned shall be paid as herein specified; that the same shall not become a fixture by being placed in any mill or other building, or by being annexed in any manner to the realty; and that said Phoenix Iron Works may at any time enter upon the premises upon which said property is located, and take possession of the same, upon a violation of any of the agreements herein contained; and that any money already paid thereon shall be considered as having been paid for the use of said property."

The instrument is sometimes designated as a receipt, and sometimes as a lease, and bears date November 15, 1882, and is signed by James A. Thompson. The plaintiffs knew at the time the instrument was executed what use Thompson was going to put the property to, and was told by Thompson what his arrangements were with defendants.

It appears that Thompson did not pay the five hundred dollars down upon the execution of the contract from his own hand, but it was obtained in this way: The Phoenix Iron Works sent the following telegram to defendants:—

"We will guarantee shipment of machinery on receipt of five hundred dollars."

To which defendants responded by telegraph:—

"We will send you five hundred dollars when James A. Thompson orders us to do so."

Thompson then sent the following telegram:—

"GEORGE S. COLWELL,—Send Phoenix Iron Works five hundred dollars as quick as possible to save delay.

"JAMES A. THOMPSON."

The machinery was thereupon shipped the day the contract between plaintiffs and Thompson bears date, namely, November 15th. The machinery and boiler were placed by Thompson in the mill under his contract with defendants. The job was not completed by the time specified in that contract.

On December 15th defendants received a letter from plaintiffs, written on the 13th, which read as follows:—

"PORT HURON, MICH., December 13, 1882.

"COLWELL, MCGREGOR, & Co., Harrisville.

"Gents,—Has Mr. Thompson informed you that the machinery shipped him was ours until paid for? We have no

doubt he has told you. There is still due us on this machinery, belting, etc., at the date of shipment, \$2,683.47, which should have been paid some days ago. As you expect to own this machinery, we thought it would make no difference to you how soon you paid for it. Let us hear from you by return mail how you feel about it, and when you expect to pay for it. We understand, of course, he has made the same arrangement with you for payment as he did with us.

"Awaiting your reply, we remain, yours, etc.,

"PHENIX IRON WORKS."

This letter was responded to by defendants on December 16th, as follows:—

"HARRISVILLE, MICH., December 16, 1882.

"PHENIX IRON WORKS, Port Huron, Mich.

"Dear Sirs,—Yours of the 14th at hand, which gave us the first information we have received of any arrangement between you and Mr. Thompson. We have never known anything of you in our dealings with Mr. Thompson, and we have never expected to make any payments that are not ordered or sanctioned by him. There is nothing due Mr. Thompson until the job is completed.

Yours truly,

"COLWELL, MCGREGOR, & Co."

Thompson claimed to have completed his contract, and left the mill, taking his tools, the latter part of December, and defendants then took possession, but claim that the mill was not completed according to contract, and that they went on and completed it at an expense of about three hundred dollars, which they claimed the right to retain out of the balance due to Thompson on the contract. After some correspondence between the parties, Thompson sent to defendants the following letter:—

"PORT HURON, MICH., January 26, 1883.

"COLWELL, MCGREGOR, & Co.

"Gentlemen,—Yours of the 22d came duly to hand. Send balance my due to the Phoenix Iron Works, this city, and send me an itemized bill of my account. The tools have not yet arrived. Will you please make inquiry of them, and oblige.

"Yours respectfully,

"JAMES A. THOMPSON."

Complying with request, defendants sent to the plaintiffs a draft, as follows:—

"HARRISVILLE, MICH., February 1, 1883.

"Pay to the order of Phoenix Iron Works, Port Huron, two thousand eighty-six and 3-100 dollars.

\$2,086.03.

COLWELL, MCGREGOR, & Co.

"To the Second National Bank, Detroit, Mich."

Which draft was accompanied, under the same envelope, by the following letter:—

"OFFICE OF COLWELL, MCGREGOR, & Co., MERCHANTS.

"HARRISVILLE, MICH., February 1, 1883.

"MESSRS. PHOENIX IRON WORKS, Port Huron, Mich.

"*Dear Sirs,*—Inclosed find draft for \$2,086.03, which is the balance due on the James A. Thompson and Colwell, McGregor, & Co. contract for building shingle-mill, under date of October 8, 1882, if we deduct nothing for loss of the use of the mill. Crowding the work as rapidly as we could, we lost the use of the mill about one month after January 1, 1883. We have deducted nothing for this damage to us, and if the inclosed draft is accepted as payment in full, we shall make no claim for damage; otherwise we do not waive our claim for damages, and if there is any further controversy in regard to this matter, we reserve the right to claim and recover our damages for loss of use of mill, and any other damages to which we have been subjected because the mill was not completed according to contract. We send the inclosed to you, per order of James A. Thompson, under date of January 26, 1883.

"Yours truly,

"COLWELL, MCGREGOR, & Co."

After this draft was received by the plaintiffs, the defendants denied that plaintiffs had any right or title to the property in question. The letter of date December 13th was the first notice or intimation that defendants had that plaintiffs had any claim upon the property. The testimony was conflicting as to the condition of the property at that time,—as to whether it was then all in place in the mill ready for operation, or whether a portion of it had not then been put in place.

The circuit judge charged the jury as follows:—

"Now, gentlemen, you are instructed that, by the terms of the written agreement executed by Thompson to the plaintiffs, which has been introduced in evidence, if you find that the same was executed as testified to, the title to the property would not pass from the plaintiffs to Thompson until such time as the terms of the agreement had been complied with,

and the plaintiffs paid the amount therein agreed upon; and this would be so, notwithstanding they may have intrusted Thompson with the possession of it, unless it has been shown that, after they had so permitted the property to pass out of their hands, and under the control of Thompson, they knowingly allowed him to convert it and use it in such a manner, in carrying out his contract with the defendants, that the plaintiffs are estopped from asserting as against them their claim to the property. But the defendants, if they were informed of the character of plaintiffs' interest in the property, and that they had reserved the title therein, or were notified that the plaintiffs claimed ownership to the property, before all the property described in the declaration had been placed in the mill, they could not retain possession of such property as was subsequently placed therein contrary to the rights of the plaintiffs under their agreement with Thompson, and to take possession of the same in the event of his failure to pay them the amount of the purchase price of the property furnished by them. If the plaintiffs knew that the machinery in controversy, when it was delivered to Thompson, was to be taken to the county of Alcona, and there put into a shingle-mill on the lands of the defendants, and were silent in respect to their claim until the machinery was all on the ground, and put in the mill or attached to it, they are now estopped from claiming it as their property.

"In other words, if you are satisfied, from the evidence, that the time plaintiffs delivered the property in question to the witness Thompson they knew he was engaged in constructing a mill for the defendants under a contract, and was to furnish the engine, boiler, and machinery required in such mill, and the plaintiffs permitted Thompson to take their property described in the declaration, and affix it to the mill so being constructed for the defendants by Thompson, and the plaintiffs neglected to inform the defendants of the manner in which they had placed their property under the control of Thompson, or give notice of their title to such property so furnished by them to Thompson for the purpose of equipping the defendants' mill until after such property had been affixed in the mill constructed on defendants' land under the contract made by them with Thompson, if the same was done without notice of or knowledge as aforesaid of the defendants, the plaintiffs cannot claim the property and compel the defendants to pay for it.

"Plaintiffs introduced a letter, dated Port Huron, December 13, 1882, and which the defendants admit was received by them on the 15th of the same month. In this letter plaintiffs ask the defendants the question: 'Has Mr. Thompson informed you that the machinery shipped to him was ours until paid for?' It further states that the plaintiffs have no doubt he (Thompson) has told defendants in respect thereto; and further, that there was due at the date of shipment \$2,683.47, which should have been paid some days ago; and defendants are requested, as they expect to own the machinery, to write how they feel about it, and when they expect to pay for it.

"Now, gentlemen, the terms of this letter are sufficiently explicit to put the defendants on their guard, and if defendants allowed the machinery, or any part of it, to be placed in their mill, and connected with other machinery or attached to the mill after the receipt of such letter, in such a way that it would have become a fixture had the machinery been the property unconditionally of Thompson, the effect of such knowledge would be, as above stated, to put defendants on their guard; and under such circumstances, they cannot claim to own the property under their contract with Thompson as a part of their real estate, which was subsequently placed in their mill, and attached to it.

"It is not claimed by the plaintiffs that defendants had any notice of their claim upon the machinery until the receipt, on the fifteenth day of December, of a letter dated the 13th of December, and it therefore becomes an important question for you to determine what may have been the stage of completion of the mill upon the fifteenth day of December, 1882.

"If you determine that at that time there was a portion of machinery which had not been placed in position for use in the mill so as to become a fixture, and if you further find the defendants afterwards, and before the commencement of this suit, denied plaintiffs' right to such property, claiming to own it as their own, then the plaintiffs are entitled to recover the value of such machinery as you may find was not placed in position for use, or attached to the mill so as to make it a fixture, not exceeding the amount of \$860, which is the amount remaining unpaid under the contract between Thompson and plaintiffs, including the principal and interest.

"If, on the other hand, you conclude that when defendants received notice of the claim of the plaintiffs to the effect that

they owned the machinery until paid for, the machinery had been placed in the mill and attached to it by Thompson, under his contract with the defendants, in the manner that it was intended to be located for use in such mill, in that event, the plaintiff cannot recover."

This charge was, in the main, correct; but it overlooked or ignored the fact that the plaintiffs' own testimony, uncontradicted by any other testimony in the case, shows that the plaintiffs knew that the machinery in controversy was to be taken to the county of Alcona, and there put into a mill, on the land of defendants, by Thompson, at the time they made the conditional sale to him. It was therefore error to submit this fact to the jury as a question in dispute under the testimony, and I think it contains a further error, which I shall point out further on.

The subject of conditional sales of personal property forms an important branch of the law, and those conditions which retain title in the vendor have caused much discussion among jurists, and have been the cause of considerable injustice to purchasers without notice, in so much that in some states sales of this character have been the subject of legislative action, requiring such contracts to be in writing, and filed, like chattel mortgages, in order to give notice to the world of the rights claimed under such contracts. Between the immediate parties to the contract, difficulties can seldom or never arise. But third parties, dealing with the vendee without notice, are the persons who suffer by such secret agreements. In this state, where the validity of such sales is recognized, the vendor's right to follow the property into the hands of third parties, or to sue them for its conversion, is made to depend upon the good faith of the transaction; and where the purchase is made from the vendee in good faith, and without notice, under circumstances in which the original vendor must have known or contemplated that the property would be sold by his vendee, and incorporated into or made part of the freehold, his rights have been made subservient to those of the innocent purchaser.

Thus in *Knouton v. Johnson*, 37 Mich. 47, where the plaintiffs sold water-wheels with the express understanding that they were to be put into a mill, and used there, although it was stipulated that no property in the wheels should vest in the purchasers until payment, yet an innocent purchaser at the mill, who had no notice of any outside interest or cl

was held to have acquired a perfect title to the wheels, and could not be made liable in an action of trover at the suit of the original vendors of the wheels. The court said: "When the plaintiffs allowed the wheels to be worked into the mill, they assumed risks, and, among them, such a result as has occurred; and it would be contrary to justice to allow them to save themselves by casting the consequences upon the defendant."

The same principle was again recognized in *Ingersoll v. Barnes*, 47 Mich. 104, where *Knowlton v. Johnson*, *supra*, was cited with approval, and distinguished from the one then under consideration, in the fact that the purchaser had notice, or at least knowledge of such facts as should have put him upon inquiry.

In this case defendants' contract with Thompson was made before he purchased of plaintiffs. That contract contemplated that the machinery should be wrought into and become part of the freehold of defendants. This fact the plaintiffs knew when they sold the machinery to Thompson, and they must have contemplated this result. Any agreement, therefore, between them and Thompson, by which they were to retain the title to the property after it so became a part of the freehold in the carrying out of his contract with defendants, would operate as a fraud upon the defendants, and make them liable as tort-feasors without any voluntary act on their part. Without giving defendants any notice of their claim that the sale was a conditional one, or a mere lease, and all payments made should be simply for the use of the property, but, instead, guaranteeing that the property should be shipped upon defendants' paying five hundred dollars on Thompson's order, they induced defendants to act, and part with their money. Under these facts, it would be gross injustice for them now to claim that the title of the property did not pass to defendants under their contract with Thompson. They are estopped from asserting that Thompson had no title to the property, and no right to place it in the mill under his contract with defendants, upon the plainest principles of justice. Nor could they do this after Thompson had placed the property in the mill, although some parts of the machinery had not been securely attached to the realty. The money was paid on a guaranty of shipment, which they could neither recall nor repudiate. At the time they gave notice to the defendants, the debt owing them by Thompson, and for which they held his note, was past

due. They could have secured anything that was then due or to become due from defendants to Thompson by the ordinary process of garnishment, if they were fearful of losing their debt. They do not appear to have had any fears of this money being diverted.

Plaintiffs and Thompson appear to have been acting in harmony. He gave an order on defendants in favor of plaintiffs for the balance due him under the contract, and they promptly paid to plaintiffs the balance they considered his due. They do not appear to have made any effort to collect the balance due them from Thompson from him. The effect of this action of trover is to collect the balance due them from Thompson from the defendants; and from all the facts and circumstances which are stated above, I do not think the action of trover will lie.

I think the circuit judge should have taken the case from the jury, and directed a verdict for the defendants, for the reason that plaintiffs understood, when they sold the machinery to Thompson, that he purchased it for the purpose of attaching it to the realty of defendants, under a contract with them that bound him to do so, and with that knowledge obtained five hundred dollars of the defendant's money, and guaranteed the shipment of the machinery for the purpose above stated, without notice to or knowledge on the part of defendants that plaintiffs still claimed the title to the machinery.

The judgment must be reversed, and a new trial granted.

VENDOR OF PERSONALTY, IN MICHIGAN, may retain the title in himself, although apparently the property is placed in the exclusive possession of the vendee, until the whole of the purchase-money is paid, but such a rule is so harsh that it should not be enforced except where the agreement to that effect is certain and unambiguous: *Edwards v. Symons*, 65 Mich. 348; *Knowlton v. Johnson*, 37 Id. 51; *Ingersoll v. Barnes*, 47 Id. 104.

JURY, QUESTION FOR. — Where there is no dispute as to facts, the question is purely one of law, and should be decided by the court, not by the jury: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736.

PEOPLE v. AIKIN.

[66 MICHIGAN, 400.]

MOTION TO QUASH INFORMATION PROPERLY DENIED WHEN. — Where the accused is charged in the complaint and warrant with manslaughter in the statutory form, and in the information with manslaughter by the administration of drugs and medicines, and by the use of an instrument, a motion to quash the information on the ground that the offenses charged therein are not those named in the complaint and warrant is properly denied.

JOINDER OF COUNTS IN CRIMINAL INFORMATION. — Where the first count in an information for manslaughter charges that the defendant did feloniously and willfully kill and slay the deceased, a second count alleges the administration of medicine and drugs, a third, the use of an instrument, and a fourth count charges the defendant with criminal neglect as a man-midwife, to whom the care of the deceased had been committed, resulting in her death, the crime charged in the fourth count is not contained within the offense charged in the first count as a lesser crime within a greater, nor does the fourth count come within the statute upon which the second and third counts are based, nor can it be considered as charging in any manner the crime of manslaughter by an attempt to produce an abortion, or by an abortion; and a general verdict of guilty under the second, third, and fourth counts cannot be sustained.

PROSECUTION SHOULD BE COMPELLED TO ELECT UPON WHAT THEORY IT ASKS CONVICTION of the accused, where in one count of the information he is charged with producing an abortion upon the deceased, and in another with criminal neglect as a man-midwife, resulting in her death.

TRUE RULE AS TO JOINDER OF COUNTS IN INFORMATION or indictment is, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legitimate one; but where the object, purpose, and effect is to prosecute the defendant for separate felonies by one information or indictment, the court will not permit it to be done, as the injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice.

CORPUS DELICTI IS TO BE ESTABLISHED, IN PROSECUTION FOR MANSLAUGHTER by procuring an abortion, not only by the *post mortem*, but also by the fact of the pregnancy of the deceased, her illness, her treatment, and by whom, and her condition generally up to the time of her death; and after the physicians have given testimony tending to show that her death was produced by abortion, it is competent and proper to show the history of her illness from the very beginning to the end, including what was done and said by the accused in connection with her illness while in the house attending upon her.

EVIDENCE OF NARRATION BY DECEASED OF WHAT ACCUSED SAID OR DID a day or days before such narration is hearsay, and inadmissible.

EXPERT CANNOT BE PERMITTED TO STATE THAT HE HAS READ OR HEARD TESTIMONY of a witness or witnesses, and then base his opinion upon such testimony, without stating the particular points of the evidence — the facts — upon which he rests his conclusion; but he may be asked, on cross-examination, to state how he differs from what was said by other

physicians sworn as experts in the case, as such inquiry itself calls upon him to state what they said, and to give his reasons, if any, why he differed from them.

TWO COUNTS MANIFESTLY RELATING TO SAME OFFENSE AND TRANSACTION ARE PROPERLY JOINED in the same information, where the one is varied from the other only to meet the evidence as it may be adduced.

INTEMPERATE COMMENTS BY COUNSEL, NOT WARRANTED BY FACTS AND CIRCUMSTANCES shown by the proofs in the case, should be checked and controlled by the trial court, and if this is not done, the appellate court will see that the injustice is corrected, and a new trial granted.

HYPOTHESIS OF GUILT MUST BE COMPARED WITH FACTS PROVED, and with all of them, in cases of purely circumstantial evidence, and if any of the facts or circumstances established be absolutely inconsistent with the hypothesis of guilt, that hypothesis cannot be true.

EACH NECESSARY LINK IN CHAIN OF EVIDENCE MUST BE PROVED BEYOND REASONABLE DOUBT to sustain a verdict of guilty in a criminal case resting upon circumstantial evidence.

INFORMATION for manslaughter. The opinion states the facts.

L. A. Ward and N. E. Earle, for the prisoner.

Moses Taggart, attorney-general, for the people.

MORSE, J. Mary Noel, the daughter of John Noel, a farmer residing a few miles out of the city of Grand Rapids, became intimate with a young man by the name of Hamilton, and from such intimacy her pregnancy resulted. Some time in January or February, 1886, her condition was discovered by her family. Hamilton refused to marry the girl, and measures were taken to conceal her pregnancy from the world at large. One Dr. Weston, the family physician, was consulted, and finally it was thought best by all concerned to let nature take its course. It was agreed by the girl, her family, and young Hamilton that a lying-in place should be secured in Grand Rapids as private as possible, and that she should be put under the care of a reputable physician in that city, who should attend her in her sickness and confinement. Hamilton, who was studying medicine, undertook to engage such physician. He called upon the respondent, who had been practicing his profession for many years in the city of Grand Rapids, and arranged with him to find a suitable boarding-place for the girl. It was agreed that respondent should be paid one hundred dollars to cover the expenses of board and his medical services. Respondent engaged board for her at a Mrs. Sleight's, who was then boarding one or two women afflicted with the same trouble.

February 19, 1886, Mr. Noel, in pursuance of this arrange-

ment, brought his daughter to the respondent's office, paid him ninety dollars, and returned home. It appears that he afterwards paid the doctor the remaining ten dollars. Hamilton gave Noel twenty-five dollars in money, and his note for one hundred dollars, the agreement being that he should pay all necessary expenses.

The same evening, after dark, she arrived at Mrs. Sleight's. She drank a cup of tea, and went to bed about eight o'clock. Soon after, she called Mrs. Sleight, who found her suffering from a chill. She was sick from that time until the twenty-sixth day of February, 1886, when she died. Aikin visited her, and prescribed for her during her sickness.

On Sunday morning, February 21st, she was delivered of a dead *fœtus*. Mrs. Sleight thinks the child was between five and six months old. She swears that Dr. Aikin came that morning, removed the after-birth, and took away the *fœtus* in a hand-satchel. He also directed ergot to be administered to stop flooding. On Monday following, the respondent brought Dr. Sligh there. During the girl's illness he also brought a Dr. Best with him to see his patient, who visited her three or four times, in company with respondent, between the 22d of February and the time of her death. Dr. Sligh first saw the girl on the 22d of February. He called upon her at the request of respondent. He visited her but once. Respondent asked him to go the next day, but he refused, and thereupon Dr. Aikin procured the services of Dr. Best, who first saw her on the 23d.

The next day after her death, a *post-mortem* examination was held, principally conducted by Dr. De Camp, who was assisted by Drs. Edie, Clark, Graves, and Bradish.

On the eighth day of March, 1886, Dr. Aikin was arrested upon a warrant issued by the judge of the police court, charging him with manslaughter. He had an examination on such warrant, and on the fourteenth day of May, 1886, was bound over to the superior court of the city of Grand Rapids to await his trial. In the September term of that court the prosecuting attorney filed an information against him, said information containing four counts.

The first count corresponded with the complaint and warrant, and alleged that on the twenty-sixth day of February, 1886, at the city of Grand Rapids, in the county of Kent, the said Nathan J. Aikin feloniously and willfully did kill and slay one Mary Noel, contrary to the statute. etc.

The second and third counts charged statutory manslaughter (Howell's Stats., sec. 9107), the second count alleging the administering of medicines and drugs, and the third the use of an instrument. These counts charged the means of the abortion with having been used on the 19th of February, 1886.

The fourth count was as follows:—

“And the prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that the said Nathan J. Aikin, late of the city aforesaid, at the county aforesaid, on, to wit, the said nineteenth day of February, A. D. 1886, at the city aforesaid, in the county aforesaid, took the care and charge of the said Mary Noel, she, the said Mary Noel, being then and there pregnant with child, as a man-midwife, and to assist and attend upon and take care of her, the said Mary Noel, and to do everything needful and proper to and for her during and after the time of her labor and delivery of the said child, wherewith the said Mary Noel was then and there pregnant.

“And that the said Nathan J. Aikin afterwards, and while he had such care of the said Mary Noel as aforesaid, and immediately after the said Mary was delivered of the said child wherewith she had then lately before been pregnant, to wit, on the twenty-first day of February, A. D. 1886, at the city aforesaid, in the county aforesaid, her, the said Mary Noel, lying on a bed in great illness, pain, and weakness, did on said last-mentioned day there feloniously neglect and refuse to attend upon, and to take proper, sufficient, and necessary care of, and to render her proper and necessary assistance, and did then, on said last-mentioned day, there feloniously neglect and refuse to do to and for her, being in such state, and did then, on said last-mentioned day, there leave and desert the said Mary Noel in such state as aforesaid, without a proper and sufficient person to take care of her, and to do for her what was needful for her, being in such state, and unable to take care of and to do what was needful and necessary for herself.

“And that by reason and means of the said Nathan J. Aikin there, on said last-mentioned day, so neglecting and refusing, as aforesaid, to do to and for her, the said Mary Noel, what was needful and proper for her, and by the said Nathan J. Aikin so leaving and deserting the said Mary Noel as aforesaid, she, the said Mary Noel, became mortally sick, emaciated, and enfeebled in body, and of said mortal sickness,

emaciation, and feebleness of body, on and from the said last-mentioned day until the said twenty-sixth day of February, A. D. 1886, at the city aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-sixth day of February, A. D. 1886, she, the said Mary Noel, at the city aforesaid, in the county aforesaid, of the said mortal sickness, emaciation, and feebleness of body, died.

"And so the said Nathan J. Aikin, in manner and form aforesaid, feloniously did kill and slay the said Mary Noel, contrary to the statute in such case made and provided, against the peace and dignity of the people of the state of Michigan."

Upon the trial the first count was practically abandoned, and the jury returned a general verdict of guilty upon the last three counts. The case is brought here upon exceptions before judgment. A large number of errors are assigned, but we shall notice only those that we think are important.

The counsel for the respondent moved, after the withdrawal of the plea of not guilty, which had been entered *pro forma*, and before trial, to quash the second, third, and fourth counts of the information, on the ground that the offenses charged therein were not the offenses named in the complaint and warrant, and on which the respondent was examined in the police court, and for the further reason that the fourth count stated no crime whatever. The motion was overruled, and exception taken.

As far as the second and third counts are concerned, the question must be considered as settled in favor of the ruling of the court below. It is not necessary to review the reasons for this holding. It has been sufficiently discussed in *People v. Sweeney*, 55 Mich. 586; *People v. Sessions*, 58 Id. 594; and *People v. McDowell*, 63 Id. 229.

But in relation to the fourth count I am satisfied that the motion should have been sustained. I do not think it is governed by either of the decisions above cited. The second and third counts are only used to state the commission of the same statutory crime of manslaughter by the use of different means, both of which are embodied in the statute. But the fourth count does not come within the statute, nor can it be considered as charging in any manner the crime of manslaughter by an attempt to produce an abortion, or by an abortion. It charges an offense entirely removed from any hint of anything but a natural birth, and the sickness of the mother resulting

therefrom, without the criminal act of any person. It puts the respondent on trial for the criminal neglect of the respondent as a man-midwife, to whom the care of the patient had been committed, and undertakes to hold him responsible for her death because of such criminal neglect, and for nothing else.

It is conceded, as it was decided in *People v. Olmstead*, 30 Mich. 431, that the first count could not be used to convict the respondent of the offense charged in this fourth count, or of any manslaughter arising out of any negligence or fault from which death was a consequential result. The first count could only be used in cases where the killing resulted directly from acts of violence: *People v. Olmstead*, 30 Id. 438, 439. The allowance of the use of the second and third counts, based upon a complaint and warrant charging manslaughter as in the first count, has been justified in this court upon the ground that the crime charged therein "grew out of the same transaction—the same facts—as in the first": See *People v. Sessions*, 58 Id. 596, 597. But it must be remembered that when this doctrine is applied to these two counts, it cannot be extended so as to admit also of the use of this fourth count, without running squarely against the very principle upon which the allowance of the second and third counts is based. If these counts grow out of the same transaction as the first,—the same facts,—then the fourth count cannot, as the charge in that count does not involve the same transaction or the same facts as in the second and third. Upon a trial upon the second and third counts alone, the criminal negligence of the defendant in his care of the girl would not be material, unless it had some tendency to show that he was guilty of either administering drugs or using an instrument to commit abortion, from the effects of which she died. And most certainly, if he had been tried upon the fourth count alone, evidence tending to show that he had administered drugs, or used an instrument, prior to the date of the neglect charged, to cause abortion, would have been not only immaterial and irrelevant, but its admission would have been error.

Neither can it be said that the crime alleged in the fourth count is contained within the offense charged in the first count, and in the complaint and warrant, as a lesser crime within a greater, as was held in *People v. Sweeney*, *People v. Sessions*, and *People v. McDowell*, heretofore cited. Manslaughter is charged in both,—a crime of the same degree

but growing out of different facts, circumstances, and conditions, and totally different in the means or methods of causing death. The one is the direct criminal act against which the statute has set its bar, and denominated manslaughter. The other is the omission to perform a duty, which omission, death resulting, the common law has made manslaughter as the penalty of the negligence, which thus becomes criminal.

But whether I am right or not in the opinion that if the second and third counts were allowed to stand, the fourth should have been quashed, it seems absolutely certain that the prosecutor should have been called upon by the court to elect under which theory he would ask the conviction of the respondent. The counsel for respondent requested the court to instruct the jury that no conviction could be had under the fourth count, which request was denied, and the case virtually submitted upon the last three counts. The prosecution were permitted to argue both theories to the jury: 1. That he was guilty of committing abortion; 2. That he was guilty of criminal neglect in his care of the sick girl after the miscarriage.

Under the general verdict he was found guilty upon all the counts. It was not pointed out to the jury that they might acquit upon the second and third, and find him guilty upon the fourth, or *vice versa*. Therefore it may be possible that a portion of the jury based their verdict upon the second and third counts exclusively, and another portion upon the fourth alone. There can be no safety in such a practice as this. They were not instructed that if they failed to find him guilty under the fourth or any count, they must acquit upon that count, or that it was necessary to find him guilty of all the counts in order to bring in a general verdict against him. And no one can know of what particular crime of the two he was convicted.

It is said in *People v. McKinney*, 10 Mich. 94, 95, that where several offenses are charged, distinct in point of law, and the trial of these several offenses would involve the proof of substantially different transactions, and thereby tend to confuse the defendant in his defense, or deprive him of any substantial right, the court should either quash or compel the prosecutor to elect which offense he will ask a conviction upon. But when the several offenses charged, though distinct in point of law, yet spring out of substantially the same transaction, or are so connected in their facts as to make substan-

tially parts of the same transaction, or connected series of facts, the defendant cannot be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election.

"In the present case [*People v. McKinney*, 10 Mich. 95], the information charges apparently several offenses of the same kind, and if the evidence related to several substantially different and distinct transactions, it would have been a proper case for putting the prosecutor to his election."

There were, in this information, in the case at bar, two distinct and separate offenses charged, upon different days, upon either of which, standing alone, the respondent might have been acquitted, or the jury have failed to convict by a disagreement. The second and third counts charge the means of abortion as being used on the 19th of February, or at least before the delivery of the child on the 21st, while the criminal neglect averred in the fourth count is alleged to have taken place on the 21st, and after the birth or expulsion of the *fetus*. He had no means of knowing upon which charge the prosecution relied, and the court at the close of the testimony refused to compel any election. It follows, then, that the jury may have agreed upon a general verdict of guilty, or at least they were permitted so to do, while yet unable to agree upon either one of the counts: *Tiedke v. City of Saginaw*, 43 Mich. 64; *Hamilton v. People*, 29 Id. 173, 177, 178.

The true and only just rule as regards the joinder of counts in an information or indictment seems to be, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legitimate one. It is a proceeding calculated to promote justice, and cannot confuse or prejudice the defense of the accused. But when the object and purpose is apparent to prosecute the respondent, and such is the logical effect, for separate felonies by means of one information or indictment, the court will not permit it to be done. The prosecutor has no right to do this, as its injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice: See 1 Bishop's *Crim. Proc.*, secs. 205-213, inclusive; *Mayo v. State*, 30 Ala. 32; *State v. Smith*, 8 Blackf. 489; *Sarah v. State*, 28 Miss. 267; 61 Am. Dec. 544; *McGregg v. State*, 4 Blackf. 101, 103; *Baker v. State*, 4 Ark. 56; *Kane v. People*, 8 Wend. 203; *People v.*

Rynders, 12 Id. 425; *State v. Nelson*, 8 N. H. 163; *State v. Flye*, 26 Me. 312; *State v. Fowler*, 28 N. H. 184; *Bailey v. State*, 4 Ohio St. 440; *People v. Austin*, 1 Park. Cr. 154; *Regina v. Trueman*, 8 Car. & P. 727; *People v. McMillan*, 52 Mich. 627; *People v. Jones*, 24 Id. 215; *Maxw. Crim. Proc.* 53; *Commonwealth v. Sullivan*, 104 Mass. 552; *Bainbridge v. State*, 30 Ohio St. 264; *State v. Henry*, 59 Iowa, 391; *Hamilton v. People*, 29 Mich. 173, 177.

Tested by this rule, it is apparent that the respondent in the case at bar has not been fairly tried. The question was raised upon the trial in a variety of ways, and numerous endeavors made by his counsel to prevent his being tried and convicted for these separate offenses under one information, but in vain. The evidence tending to show that he committed an abortion upon this girl in his office before she ever went to the house of Mrs. Sleight, and that he gave her a "black medicine" for the same purpose after she arrived at Mrs. Sleight's, and before the delivery of her child, and which medicine, it being in a bottle, he took away, was permitted to be used to convict him, under the fourth count, of having criminally caused her death by neglecting and refusing to take proper care of her after the child was born; and, on the other hand, the evidence tending to show that he neglected her after the child was born was allowed to be used to convict him, under the second and third counts, of having caused her death by abortion by medicines, drugs, or instrument, administered or used previous to the date of the expulsion of the *fetus*. Thus the evidence legitimately tending to show one crime was also illegally used to convict the respondent of another offense which it had no tendency to prove, and *vice versa*.

I cannot approve of this course of procedure in a criminal case of this magnitude, nor can I find any reputable authority that sustains it. The two offenses charged did not relate to one and the same transaction, nor were these counts framed and used as different ways of charging the same offense. One was a statutory manslaughter created by the legislature, and unknown to the common law, and the other manslaughter by the common law, and not the creation of the statute. Nor is this all. The two alleged offenses are as different in their nature, and in the means of bringing about death, as they well can be, and one is radically inconsistent with the other. He could not be guilty of both at the same time and with the same person. If the drugs he administered, or the "mortal

bruises and wounds" he gave her, caused her death, as stated in the second and third counts, his neglect after the 21st of February did not kill her; and if her death was caused by neglect after such date, then the drugs and bruises given before that time did not destroy her.

But I will not pursue the matter further. It seems to me unanswerable that no man should be prejudiced in this manner when on trial for a capital offense. He has a right to be warned by the complaint and warrant of what he is accused, and ought not to be convicted of two different crimes, committed at different times, under one information, with the evidence of each confounded as a whole, and used indiscriminately to convict him of both. Such a proceeding violates every principle of justice, and places him at the mercy of the prosecutor; and as in this case evidence not competent to prove one of the offenses, but admissible as to the other, is used to establish both crimes, such a trial must necessarily be an unfair and illegal one.

It is also complained that the court, against the repeated objection of the respondent's counsel, violated the method of procedure in the introduction of testimony, as to its order, pointed out and established by this court in *People v. Hall*, 48 Mich. 485, 42 Am. Rep. 477, and *People v. Millard*, 53 Mich. 67, by permitting the prosecutor to show facts and circumstances tending to prejudice the respondent before the *corpus delicti* was established.

The first witness placed upon the stand was John Noel, the father of the dead girl. He testified to her age, and the date of her death, and the time that she left home for Grand Rapids, and that she was then pregnant, and to some other things which, although objected to, were not material as far as the order of proof was concerned. He also testified to matters connecting Dr. Aikin with the care and charge of the girl, under the agreement heretofore spoken of, which, strictly speaking, ought not to have been permitted at that time, before any of the facts attending the girl's sickness and death had been given. But we do not think any great harm was done, as the court, before the examination in this line had proceeded to any great length, advised the prosecutor that he was not pursuing a very safe course under the rulings of the supreme court. The prosecuting attorney thereupon dismissed the witness, and proceeded to examine Drs. De Camp and Edie as to the result of the *post mortem*.

When their evidence was concluded, Mrs. Anna Sleight was called as a witness. She commenced to give a history of the girl's stay in the house, commencing with the respondent's contracting for her coming there. This was objected to, and the prosecutor was asked by defendant's counsel if he was through with the evidence of the *corpus delicti*. He answered that this (the evidence of the two doctors) was all the testimony the prosecution had as to the *post mortem*, but they were not through as yet with the *corpus delicti*. The objection was then reiterated, defendant's counsel stating that it was incompetent, as not being the correct order of proof, and that they desired to have the testimony completed upon the point of the death from criminal causes, so that a motion might be made to test the question of a criminal death being established. The objection was overruled, and Mrs. Sleight permitted to proceed. The witness then gave in detail, as well as she could, the story of the girl's sickness, her attendance received and medicines taken, the delivery of the child, and all the subsequent events as they took place up to the hour of her death.

There was no error in the admission of this testimony. The evidence of the physicians tended to show that the death of this girl was produced by abortion; and it was competent, as tending in the same direction, to show the illness of the girl from its commencement, and how she came to be at this house where she died. The *corpus delicti* was not only to be established by the *post mortem*, but also by the fact of her pregnancy, her illness, her treatment, and by whom, and her condition generally up to the time of her death. A history of her illness from the very beginning to the end, in detail, was most proper and perfectly legitimate to prove the *corpus delicti*; and what the respondent did and said in connection with such illness while in the house attending upon the sick girl was properly a part and parcel of such history.

In *People v. Hall*, 48 Mich. 485, 42 Am. Rep. 477, and *People v. Millard*, 53 Mich. 67, to which we are cited, the testimony held to be improperly admitted, as to its order, was evidence of the respondent's illicit relations with other women, and not connected with the illness and death of the deceased. In those cases, the improper evidence went to the motive of the accused, and had no business before the jury until the criminal death was established. Here the testimony objected to appertained directly to the cause of death, and was manifestly a part of the main case.

On Monday night, two days and one night after the birth of the child, the girl had a talk with Mrs. Sleight, who was at that time taking care of her. The deceased was vomiting, and said: "Oh! ain't it awful,—that awful medicine?" Mrs. Sleight replied: "Yes. What made you take it?" And the girl then said she was persuaded to take it; the doctor was to blame,—Dr. Aiken,—and that she was not to blame herself. Mrs. Sleight testified that the medicine she was talking about was a "black medicine" that Dr. Aikin took away upon Sunday morning, and that the deceased took some of it on Saturday night.

The prosecuting attorney's assistant, Mr. Fairfield, claimed upon the argument, as appears by the record, that this talk of the girl established the fact that the abortion was produced by this very medicine administered by the respondent on Saturday evening.

It is insisted that this statement of the girl was hearsay, the narrative of a past transaction, not a part of the *res gestæ*, and therefore inadmissible. We do not think the admission of this testimony can be sustained on any legal grounds. It is not pretended that it was a dying declaration, and it was not a part of the *res gestæ*. Anything that she said during her illness, as to her present pain or suffering, might properly have been admitted to show her present condition, and her symptoms at the time she made the declaration; but her narration of what the respondent had said or done a day or days before she made the statement was purely hearsay, and could not be admitted under any exception to the general rule excluding such testimony.

It is evident, from the record of the trial, as we have it before us, that this statement of the deceased, on Monday evening, of what took place on Saturday evening, was used with the most damaging effect against the respondent. There was no possible way of disputing it, and it was error to receive it.

Several assignments of error are raised upon hypothetical questions propounded by the prosecutor to Drs. Sligh, Best, De Camp, and Weston, but we are unable to find anything improper either in the form or substance of such questions.

Dr. Maxim, a medical expert called by the defense, had read the testimony of Drs. Edie and De Camp, the only witnesses sworn as to the *post-mortem* examination. He was asked this question:—

"Q. Do you know what they state there with reference to

any violence having been used upon the body of Mary Noel, or marks or abrasions, or anything of the kind? A. I do.

"Q. I desire to ask you now, if, in your opinion, this degenerated condition of the os and neck of the womb, as described by Dr. De Camp, could exist in *post-mortem* cases when no interference whatever had been made?"

This was objected to, and properly excluded. The facts as testified to by Dr. De Camp, as to this particular condition of the parts named, should have been stated to the witness; otherwise the jury could not know upon what facts Dr. Maxim was stating his opinion. An expert can never be safely permitted to state that he has read or heard the testimony of a witness or witnesses, and then base his opinion upon such testimony, without stating the particular points of the evidence—the facts—upon which he rests his conclusion. There is no reputable authority for any such method of examining an expert witness.

Upon cross-examination, the same witness was asked to tell the jury how he differed from what these doctors (De Camp and Edie) said about the case. This was objected to by defendant's counsel, and it is contended that if the direct inquiry above noticed was not proper, the last question must be governed by the same rule. This is not so, as the inquiry itself called upon him to state what the other doctors said, and to give his reasons, if any, why he differed from them. This he could not well do without stating the specific facts upon which his reasons were based. And in answer to the question, it clearly appeared that he could not state wherein he differed from them upon the state of facts as testified to by them.

It is also claimed that in three of the hypothetical questions put to this same witness by the prosecution on his cross-examination, matters were contained as facts upon which to base said questions, which the evidence did not warrant to be assumed. We are satisfied, from a close examination of the record, that there was evidence from which it might legitimately have been inferred that the deceased was, previous to her coming to Mrs. Sleight's, strong, healthy, and robust, and that spots were discovered upon the examination of the womb that might have been made by a little round instrument. It is not so certain about there being any testimony that "the blood had coagulated" upon little places at the neck of the womb, but there was evidence that there had been what the physicians called an extravasation of blood of the tissues, or a

settling of blood in the tissues, causing inflammation. This was probably what the counsel meant to refer to, and we do not consider the discrepancy, if it can be called any, between the assumed fact and the one in evidence at all material or harmful in its effects upon the respondent's rights.

It is also assigned as error that the court allowed the case to go to the jury upon any of the counts in the information; and it is argued that there was absolutely no evidence tending to show that the respondent was guilty of either of the offenses charged against him. It is true that the evidence was circumstantial. There was no testimony of any eye-witness who saw an instrument used, or of any person that could positively and directly show that any medicine or drug administered by the respondent caused the unnatural birth of the child. It could not well be expected that this would be so. Without expressing any opinion as to the weight of the evidence, we are satisfied that there was sufficient testimony to be submitted to the jury upon the second and third counts, and that we should not disturb a verdict of guilty upon either one of them if otherwise a fair trial had been afforded the defendant. And it was proper that these two counts should be joined in the information, as they manifestly related to the same offense and the same transaction, and one was varied from the other only to meet the evidence as it might be adduced.

But I am also satisfied that the court erred in submitting the offense charged in the fourth count to the jury. There was absolutely no evidence tending to show any criminal neglect of the deceased after the birth of the child. Not only was the attendance of the respondent persistent and repeated, but he called other reputable physicians, one of whom was there at least three times, and on as many different days; and there is no complaint that his treatment was faulty, or that he did not do all he reasonably could to save her life. The time when he neglected to see her, when called for by Mrs. Sleight, was on Saturday evening, before the miscarriage. But the neglect averred was afterwards. Nor is there any just reason for charging him with the coldness of the room, or the condition of the bed or bedding. It seems that no one found any fault with the arrangements Mrs. Sleight had made for this girl's reception, or the condition of the room she was in, excepting the respondent himself, and none of the testimony except his own, unless it be by inference, would war-

rant any assertion that she was neglected as far as the appointments of the room were concerned. Mrs. Sleight herself, a witness for the prosecution, testifies that it was comfortable in every respect; and Dr. Sligh, who was also attending a patient there, and had been doing so before this girl came there, does not find any fault with the surroundings of the deceased.

And yet Mr. Fairfield was allowed to inflame the jury as follows: "He finds her upon a bed of straw; he leaves her upon a bed of straw; and on Saturday night, when the old man Sleight goes to him, and says she is worse,—'Come up, doctor; your patient is worse,'—he tells you, in his own tongue, upon the stand, that it was a cold night; that he was not feeling very well; and he did not go up. When he got one hundred dollars of this man's money to see to his eldest daughter, that she should not suffer, he lays quietly down in his warm bed, and then and there sleeps, lets her lay upon a bed of straw while her life ebbs away by the blood that is drawn from her by his very acts, perpetrated upon that Friday that she was in his office. Then talk to me about not being criminally negligent in taking care of this girl! It is idle and nonsensical to talk about it. . . . He put her upon a bundle of straw, and let her die like a dog, except that he trotted around the city, and got in physicians to prescribe from time to time."

And he was permitted to use plenty of language of like import. It will be remembered that the Saturday night Mr. Fairfield refers to was before the delivery of the *fœtus*, and the respondent's action at that time is not informed against in this fourth count.

The bundle of straw referred to is shown by the testimony of Mrs. Sleight and others to have been a straw-tick newly filled. Mr. Sleight and wife testify that there was a stove in an adjoining room that kept this room sufficiently warmed, and there is no evidence that it did not do so. They also both testify that the room and the bed were comfortable in every respect, and there is no evidence to the contrary, except that of Dr. Best and the respondent, who simply testify that they suggested changes of linen, and other changes at times. The mother of the girl, who was present during the last days of the daughter's illness, found no fault whatever, in her testimony, with the condition of the room or bed, or the care that was given the patient by the respondent. Her removal

was talked of by Dr. Best and the respondent, but the mother thought she could not be safely carried home. The criminal neglect seems to have been more in the imagination of the counsel for the prosecution than in fact. There is no warrant in the evidence for any such charge,—at least after the birth of the child.

As to the room not being properly heated, it will be noted, upon an examination of the record, that the prosecuting attorney undertook to prove by Mrs. Noel, the mother of the girl, that the room the deceased had been accustomed to sleep in at home was no warmer than the one she occupied at Mrs. Sleight's; and that he made this offer, to use his own language, for the purpose of proving that the chill could not "be accounted for by going into a cold room; simply to show that it was not any different than she had been accustomed to." This proof was ruled out by the court as immaterial. And yet the lack of warmth in this room was repeatedly made the basis of an argument to the jury to show criminal neglect on the part of the respondent in allowing her to remain there.

There can be nothing gained in the end by an overzealous and unfair perversion of facts in order to convict an accused person of a crime of which the prosecutor may have good reason to believe him guilty, and which, as in this case, may be hard to establish by the ordinary and established methods of procedure. While the zeal of the prosecutor may be well excused, and the hot and bitter language that comes from the heart, involuntarily, of one who is thoroughly impressed with the heinousness of the crime and the guilt of the respondent, is to be expected in such cases, it is nevertheless the duty of the court sitting impartially between the people and the prisoner to check and control any intemperance of zeal or language that is not warranted by the facts and circumstances shown by the proofs. If this is not done, as it was not in this case, the final court of review, removed entirely from the passion and prejudice that generally surround the trial in the lower courts of cases of this nature, will see to it that the injustice is corrected, and a new trial granted.

By this permission of unfair and unjust conduct on the part of the public prosecutor or his assistants, not only is the course of justice perverted, but added cost and delay are the natural consequences of the attempt of the court of last resort to give to every citizen accused of crime the protection granted by the constitution,—a fair trial before an impartial jury.

It must also be remembered, that however heinous the crime, and however difficult it may be to establish it by the usual and approved means of procedure, and no matter how firmly the public prosecutor and the community at large may be satisfied of the guilt of the accused, and even though in fact he may be guilty, the rules and methods of trial permitted to be relaxed or disregarded in his particular case, with perhaps the laudable object and desire that justice may be done, must, nevertheless, as a natural consequence of the ways of our jurisprudence, appear hereafter as so relaxed or disregarded as precedents to be used against all persons accused of crime, to vex the innocent as well as the guilty. There is therefore no safety and no justice in allowing the supposed merits of a particular case to override and set aside, even for a moment, the barriers that our constitution and laws have hedged about the citizen when arraigned and put upon trial for an alleged crime.

A substantial error was also committed by the court in his charge to the jury as to the proof required for conviction. He instructed them as follows: "The rule requiring the jury to be satisfied of the defendant's guilt, beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied, beyond a reasonable doubt, of each link in the chain of circumstances relied upon to establish the respondent's guilt. It is sufficient if, taking the testimony all together, the jury are satisfied, beyond a reasonable doubt, that the defendant is guilty."

The defendant's counsel had before that requested the following instruction, which was refused: "If the jury find that one material fact proven in the case is inconsistent within the theory of guilt, as claimed by the people, then the respondent must be acquitted."

There is some authority to sustain this portion of the charge of the court: See *Sackett on Instructions to Jury*, 483; *Houser v. State*, 58 Ga. 78; *Jarrell v. State*, 58 Ind. 293; *State v. Hayden*, 45 Iowa, 11. The latter court say: "It is not a reasonable doubt of any one proposition of fact in the case which entitles to an acquittal. It is a reasonable doubt of guilt arising upon a consideration of all the evidence in the case."

This language may be and probably is good law when applied to any proposition of fact in the case, the establishment of which is not absolutely necessary to the conviction of the accused. But it is not good law, in reason, or by the weight

of authority, when applied to a fact material and necessary to establish the defendant's guilt, which in the common wording of the books is called a link in the chain of circumstances. When a link is out, the connection of the chain is broken, and the chain goes no further than to the missing link. To complete the chain, the link is necessary, and it may be in the center, and the most important of all. If one link may be left out, another may, and in the end the jury may be authorized to throw a few established links together in a heap, and guess that the chain is completed, or would be if the other links could be found.

Reese, J., in *Marion v. State*, 16 Neb. 359, in speaking of a similar charge to the one under consideration, very aptly says: "What is meant by the word 'link' as used therein? If the jury were given to understand that it referred only to evidentiary facts which might add force or weight to other facts from which the inference of guilt could be drawn, then the instruction might be said to be correct; but if, by the use of the word 'link' is meant such criminative facts which of themselves form the chain of evidence from which the inference of guilt is to be drawn, then the instruction does not state the law correctly. No chain can be stronger than its weakest link. If the link is gone, it is no longer a chain. If the word 'link' here refers to those circumstances which are essential to the conclusion, it is not a correct statement of the law."

In the case before us, the court refused to instruct the jury that any material fact proven in the case inconsistent with the theory of guilt would entitle the respondent to an acquittal; and the charge in relation to the links in the chain, taken in connection with such action, must have given the jury to understand that a material fact might be wanting, and yet upon the whole case they might convict the respondent. It has always been held, in cases of purely circumstantial evidence, that if any of the facts or circumstances established be absolutely inconsistent with the hypothesis of guilt, that hypothesis cannot be true. The hypothesis of guilt is to be compared with the facts proved, and with all of them: Burrill on Circumstantial Evidence, 736, 737; Wharton on Criminal Evidence, 9th ed., sec. 18; Will on Circumstantial Evidence, 3d ed., 17.

The verdict of guilty in a criminal case resting upon circumstantial evidence is built upon a series of facts connected logically together, and one fact succeeding another in a certain

order; one fact resting or depending upon another as a result of the proceeding. These material and essential facts necessary to convict, following one another, and each adding strength and conviction to the other and the whole, and which, as a whole, complete a perfect and irresistible chain, must each and every one be established and proved. And who can say that this chain so formed is a perfect and complete chain to a moral certainty, or beyond a reasonable doubt, if there be a want of such moral certainty or a reasonable doubt as to the existence of one of these links, without which the chain is broken and incomplete? Each necessary link, each and every material and necessary fact upon which a conviction depends, must be proved beyond a reasonable doubt: *People v. Fairchild*, 48 Mich. 31; *Burrill on Circumstantial Evidence*, 733-736; *Commonwealth v. Webster*, 5 Cush. 296, 313, 317, 318; 52 Am. Dec. 711; *Walbridge v. State*, 13 Neb. 236; *People v. Guidici*, 100 N. Y. 503; *Bressler v. People*, 117 Ill. 422; 1 Starkie on Evidence, 502; 3 Phillips on Evidence, Cowen and Hill's notes, 472, note 288.

The charge of the court, except as heretofore noted, cannot be complained of. We do not think that any matter of fact was incorrectly stated therein, or that anything was taken for granted by the court upon which there could justly be any dispute. It must be conceded, from the evidence, we think, that the deceased, when she came to Grand Rapids, was pregnant with a quick child.

It is assigned as error that the court said to the jury that there was no dispute that there was an abortion from which Mary Noel died. It is evident, however, that in the use of the word "abortion" the court did not mean a criminal act causing an untimely delivery, but a miscarriage from some cause, either criminal or accidental. In fact, he informs the jury that he called it an abortion because the child had taken on the principle of life, and he claimed that the difference between abortion and miscarriage was that the first term was used when the child had become quickened with life, and the latter when the *fœtus* had not taken on life. From the whole charge the jury must have understood, as they were plainly informed, that the fact of a criminal abortion was not admitted, and that they must find such criminal abortion by the act or means of the respondent in order to convict him.

I am unable to find any other error in the proceedings than those above noticed. For these a new trial must be granted.

Let it be certified accordingly to the superior court for the city of Grand Rapids.

INDICTMENT. — THE LAW AS TO TWO OR MORE COUNTS IN ONE INDICTMENT is discussed in note to *State v. Bell*, 92 Am. Dec. 661-665; *State v. Nelson*, 14 Rich. 169; 94 Am. Dec. 130; *Sarah v. State*, 28 Miss. 267; 61 Am. Dec. 544.

CRIMINAL EVIDENCE — **CORPUS DELICTI.** — THE CORPUS DELICTI may be proved by circumstantial evidence, but such evidence must be strong and cogent: *State v. Davidson*, 30 Vt. 377; 73 Am. Dec. 312; *State v. Williams*, 7 Jones, 446; 78 Am. Dec. 248; *Willard v. State*, 27 Tex. App. 386; *ante*, p. 197, and note.

MISCONDUCT OF COUNSEL IN ARGUMENT, when so seriously improper as to call for a reversal of judgment: See extended note to *McDonald v. People*, 9 Am. St. Rep. 559-569. Compare the recent cases of *Mayo v. Wright*, 63 Mich. 32; *People v. McDowell*, 63 Id. 229.

SHERWOOD v. WALKER.

[66 MICHIGAN, 568.]

PARTY AFTER GIVING APPARENT CONSENT TO CONTRACT OF SALE MAY REFUSE TO EXECUTE IT, or he may avoid it after it has been completed, if the assent was founded on the contract made upon the mistake of a material fact; such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding.

WHERE COW CONTRACTED TO BE SOLD ON UNDERSTANDING OF BOTH PARTIES THAT SHE IS BARRKEN, and useless for breeding purposes, proves not to be so, the vendor has the right to rescind the contract, and to refuse to deliver the cow.

REPLEVIN. The opinion states the case.

William Aikman, Jr., and D. C. Holbrook, for the appellants.

C. J. Reilly, for the plaintiff.

MORSE, J. Replevin for a cow. Suit commenced in justice's court. Judgment for plaintiff. Appealed to circuit court of Wayne County, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out twenty-five assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that

the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff.

The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne County, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle.

The plaintiff is a banker living at Plymouth, in Wayne County. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed.

May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter:—

"WALKERVILLE, May 15, 1886.

"T. C. SHERWOOD, President, etc.

"*Dear Sir,*— We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer.

"Yours truly,

"HIRAM WALKER & SONS."

The order upon Graham inclosed in the letter read as follows:—

"WALKERVILLE, May 15, 1886.

"GEORGE GRAHAM,— You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of

Aberlone, lot 56 of our catalogue. Send halter with cow, and have her weighed. Yours truly,

"HIRAM WALKER & SONS."

On the 21st of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, eighty dollars, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit.

After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant, and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken.

The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren, and would not breed; that she cost \$850, and if not barren would be worth from \$750 to \$1,000; that after the date of the letter and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the 20th of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following.

On the 19th of May the plaintiff wrote Graham as follows:—

"PLYMOUTH, May 19, 1886.

"MR. GEORGE GRAHAM, Greenfield.

"Dear Sir,—I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning. Yours, etc.,

"T. C. SHERWOOD."

Plaintiff explained the mention of the two cows in this letter, by testifying that when he wrote this letter the order and

letter of defendants were at his house, and writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy at ninety dollars and Rose 2d at eighty dollars. When he received the letter, he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order; if they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover.

The defendants submitted a number of requests, which were refused. The substance of them was, that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed, and her price thereby determined; and that if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftentimes tends to confuse, rather than to enlighten, the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over fifty dollars, the contract of sale, in order to be valid, must be one where the purchaser has received or accepted a part of the goods, or given something in earnest or in part payment, or where the seller has signed some note or memorandum in writing: Howell's Stats., sec. 6186.

Here there was no actual delivery, nor anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the purchase price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yard or to send check by mail.

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow upon presentation of the order at such cattle-yard. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no doubt but the cow would have passed with the sending and receipt of the letter and order by the plaintiff.

Payment was not to be a concurrent act with the delivery, and therein this case differs from *Case v. Dewey*, 55 Mich. 116. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep; and it was held that such delivery could only be made by a surrender of the possession to the vendee, and an acceptance by him.

Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where ~~the~~

article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the statute of frauds does not interpose, without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by the jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff.

I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence or any act of the defendants, or any agent of theirs, to be well or accurately done. It could made no difference where or when she was weighed, if the same was done upon correct scales by a competent person. There is no pretense but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be done before the delivery even, or the passing of the title. The order to Graham is to deliver her, and then follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, before delivery, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of pay-

ment of the price or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: *Lingham v. Eggleston*, 27 Mich. 324; *Wilkinson v. Holiday*, 33 Id. 386; *Grant v. Merchants' and Manufacturers' Bank*, 35 Id. 527; *Carpenter v. Graham*, 42 Id. 194; *Brewer v. Michigan Salt Ass'n*, 47 Id. 534; *Whitcomb v. Whitney*, 24 Id. 486; *Byles v. Colier*, 54 Id. 1; *Scotten v. Sutter*, 37 Id. 526, 532; *Ducey Lumber Co. v. Lane*, 58 Id. 520, 525; *Jenkinson v. Monroe Brothers & Co.*, 61 Id. 454.

It appears from the record that both parties supposed this cow was barren, and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so.

The circuit judge ruled that this fact did not avoid the sale, and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded on the contract made upon the mistake of a material fact; such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual: 1 Benjamin on Sales, secs. 605, 606; Leake on Contracts, 339; Story on Sales, 4th ed., secs. 148, 377; see also *Cutts v. Guild*,

57 N. Y. 229; *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 9 Allen, 492; 85 Am. Dec. 779; 12 Allen, 44; *Hutchmacker v. Harris's Adm'rs*, 38 Pa. St. 491; 80 Am. Dec. 502; *Byers v. Chapin*, 28 Ohio St. 300; *Gibson v. Pelkie*, 37 Mich. 380, and cases cited; *Allen v. Hammond*, 11 Pet. 63, 71.

If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding.

"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration": *Kennedy v. Panama etc. Mail Co.*, L. R. 2 Q. B. 580, 588.

It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least \$750; if barren, she was worth not over \$80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true, she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time,

and for her present and ultimate use. She was not, in fact, the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow; and if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration; and it must be considered that there was no contract to sell, or sale of, the cow as she actually was. The thing sold and bought had, in fact, no existence. She was sold as a beef creature would be sold; she is, in fact, a breeding cow, and a valuable one.

The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that, in fact, she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

SHERWOOD, J., delivered a dissenting opinion. He agreed with Morse, J., that the contract made was not within the statute of frauds, and that payment for the cow was not a condition precedent to the passing of the title from the defendants to the plaintiff, and further, that the plaintiff was entitled to a delivery of the cow to him when the suit was brought, unless there was a mistake made which would invalidate the contract, and he could find no such mistake. There was no pretense that there was any fraud or concealment in the case. He maintained that the record showed that the plaintiff, although he believed at the time when the contract was made that the cow was farrow, still thought that she could be made to breed. There was, he said, no pretense that the plaintiff bought the cow for beef, and there was nothing in the record indicating that he would have bought her at all only that he thought she might be made to breed. He knew of no law to justify the holding that because it turned out that the plaintiff was more correct in his judgment as to one quality of the cow than the defendants, and a quality, too, which could not by any possibility be positively known at the time to either party to exist, the contract might be annulled by the defendants at their pleasure. He thought the circuit judge was right in his construction of the contract. There was no warranty in the case of the quality of the animal. When a mistaken fact is relied upon as ground for rescinding, such fact must not only exist at the time the contract is made, but must have been known to one or both of the parties. Where there is no warranty, there can be no mistake of fact when no such fact exists, or if in existence, neither party knew of it, or could know of it; and that was precisely this case. Neither party knew the actual quality and condition of this cow at the time of the sale. The defendants sold her for what they believed her to be, and the plaintiff bought her as he believed she was, after the statements made by the defendants. No conditions whatever were attached to the terms of sale by either party. It was as absolute as it could well be made,

and he knew of no precedent as authority by which the court could alter the contract thus made, and interpolate into it a condition by which, if the defendants should be mistaken in their belief that the cow was barren, she should be returned to them, and their contract should be annulled. It is the duty of courts to enforce contracts legally made, not to destroy them. There was, he said, no mistake of any such material fact by either of the parties in the case as would license the vendors to rescind. There was no difference between the parties, nor misapprehension as to the substance of the thing bargained for, which was a cow supposed to be barren by one party, and believed not to be by the other. As to the quality of the animal subsequently developed, both parties were equally ignorant, and as to this each party took his chances. He agreed with the majority of the court that the right to rescind occurs whenever the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive of the parties in making the contract, yet it will remain binding. In this case the cow sold was the one delivered. What might or might not happen to her after the sale formed no element in the contract. He claimed that *Kennedy v. Panama etc. Mail Co.*, L. R. 2 Q. B. 588, clearly sustained his views, and referred to *Smith v. Hughes*, L. R. 6 Q. B. 597, and *Carter v. Crick*, 4 Hurl. & N. 416. Whatever mistake there was in this case was upon the part of the defendants, and while acting upon their own judgment. But it is elementary law that the mistaken party, acting entirely upon his own judgment, without any common understanding with the other party in the premises as to the quality of an animal, is re-unediless if he is injured through his own mistake: *Leake on Contracts*, 338; *Torrance v. Bolton*, L. R. 8 Ch. App. 118; *Smith v. Hughes*, L. R. 6 Q. B. 597. He analyzed the following cases cited in the majority opinion, viz.: *Gibson v. Pelkie*, 37 Mich. 380; *Hutchmacker v. Harri's Adm'rs*, 38 Pa. St. 491; 80 Am. Dec. 502; *Cutts v. Guild*, 57 N. Y. 229; *Byers v. Chapin*, 28 Ohio St. 300; *Gardner v. Lane*, 9 Allen, 492; 85 Am. Dec. 779; *Allen v. Hammond*, 11 Pet. 63; and *Harvey v. Harris*, 112 Mass. 32; but said he failed to discover any similarity between them and the present case; nor had he been able to find any adjudicated case going to the extent, either in law or equity, that had been held in this case. He understood the law to be well settled that there is no breach of any implied confidence that one party will not profit by his superior knowledge as to facts and circumstances equally within the knowledge of both, because neither party reposes in any such confidence unless it be specially tendered or required, and that a general sale does not imply warranty of any quality or the absence of any; and if the seller represents to the buyer what he himself believes as to the qualities of an animal, and the purchaser buys relying upon his own judgment as to such qualities, there is no warranty in the case, and neither has a cause of action against the other if he finds himself to have been mistaken in judgment. He thought the principles adopted in *Williams v. Spurr*, 24 Mich. 335, completely covered this case, and ought to have been allowed to control in its decision. He also cited *Story on Sales*, secs. 174, 175, and 382, and *Benjamin on Sales*, sec. 430.

CONTRACT — MISTAKE. — A mistake as to the existence or identity of the subject-matter of a contract is fatal to the contract itself, because of the want of the mutual assent necessary to its creation; but the mistake must be one affecting the existence or identity of the thing sold: *Hecht v. Batcheller*, 147 Mass. 335; 9 Am. St. Rep. 708, and note 712.

CANIFF v. BLANCHARD NAVIGATION COMPANY.

[65 MICHIGAN, 638.]

ACTIONABLE NEGLIGENCE EXISTS FROM OMISSION TO PERFORM DUTY OF OBSERVING DUE CARE, according to the circumstances, to prevent injury to the person or property of one who has the right to expect the duty will be performed. But the owner of a vessel laid up for the winter is not guilty of such negligence in leaving the hatchways open and unprotected; and persons walking on the decks, under such circumstances, are chargeable with notice of the probable presence of such open hatchways.

FAILURE OF SHIP-KEEPER TO WARN PERSON OF OPEN HATCHWAY, IF NEGLIGENCE, CANNOT BE IMPUTED to the owner of the vessel, where the ship-keeper invites the person on board, contrary to the orders of the owner.

MATE OF VESSEL INJURED THROUGH NEGLIGENCE OF MASTER CANNOT RECOVER in an action against the owner. The negligence is that of a fellow-servant.

RULE REQUIRING OCCUPIER OF PREMISES, AS TO PERSONS THEREON BY HIS INVITATION, express or implied, to keep them free from danger, or to warn of danger known to him and unknown to the visitor, has no application to a case where a person who, from his experience through many years in a sailing-vessel, knows that it is customary to leave the hatchways of vessels open while lying in port, and that they are sources of danger which he must avoid at his peril.

CASE. The opinion states the facts.

George S. Hosmer, for the appellant.

W. L. Carpenter and R. E. Frazer, for the plaintiff.

CHAMPLIN, J. This is an action brought by the plaintiff to recover damages arising from alleged negligence of the defendant as owner of the steam-vessel called the *Don M. Dickinson*.

He alleges in his declaration that this vessel was constructed with a main or lower deck, and an upper deck, through which, at occasional intervals, holes were cut for the purpose of loading and unloading freight, called hatchways; that the main deck, on the eleventh day of March, 1886, was entirely closed in, by the covering being placed over the gangways, and over the hatchways on the upper deck, and the hatchway in the forepart of the main deck was negligently left uncovered and open; that on the day aforesaid plaintiff contracted with William J. Crosby, the master and keeper of said barge, and a duly authorized servant of said defendant, to work on said boat as a mate thereon through the season of navigation next ensuing, which would commence some time after the first day of April, 1886; that after the aforesaid engagement was made, the plaintiff then, at the invitation of Crosby, went on board

the said barge to inspect the same; that he got on board of said boat on its upper deck at a point near the forepart of the same, and walked lengthwise on said deck to the afterpart of the boat, and there descended a ladder to the main deck, on reaching which, owing to the facts above set forth, he found himself in total darkness; and not knowing the whereabouts of said Crosby, who had preceded him, he shouted, and said Crosby, who in the mean time had reached the forepart of the main deck of said boat, answered, and negligently told said plaintiff to come forward, and negligently omitted to warn said plaintiff that said hatchway was uncovered; that plaintiff thereupon proceeded along towards the forepart of said boat, not knowing that said hatchway was uncovered, and not knowing the location of said hatchway, and owing to the darkness, being unable to discover the same; and while so proceeding, in consequence of the negligence of the servant of the above-named defendant above set forth, and in the exercise of due care on his part, said plaintiff fell through said uncovered hatchway, through said main deck, into the hold of said barge, about ten feet below. The declaration then sets forth the injury received in consequence thereof.

A second count of the declaration alleges the negligence of the defendant to consist in leaving the hatchway uncovered, and that he was upon said boat by invitation of the keeper of said boat, a duly authorized servant of the defendant, and that the servant negligently invited him to come forward, and negligently omitted to inform him of the whereabouts and condition of said open hatchway.

All of the testimony given upon the trial is returned in the bill of exceptions, from which it appears that the plaintiff had been sailing for twelve to fourteen years, and was familiar with the boats as they are laid up; that the steam-barge Don M. Dickinson was what is known as an iron boat, and had been built as a blockade runner; that this boat, and a steam-tug called the Justice Field, had been in use by defendant during the season of 1885, and at the latter part of the season were laid up in winter quarters in a slip at the foot of Adair Street, in the city of Detroit.

William J. Crosby had been employed as master of the Don M. Dickinson during the season of 1885; and when she was laid up in the fall, his duties as such master ceased, and he was employed as ship-keeper of the vessels. His duty as ship-keeper was to keep all people off of the vessels, and to

see that they were aired, and to keep the show shoveled off, and in case they commenced to leak, to pump them out.

It also appears that it is a universal custom when vessels are in port, and especially when laid up for the winter, to ventilate them for the purpose of stopping decay in them, and in the case of iron vessels, to protect them from rusting. This is done by removing the hatches, to allow the air to circulate through the hold. The hatches of the main deck of the double-decked vessels are always kept off on bright days, or on good windy days, and upper hatches are also taken off, so that the circulation of air will be complete. If it be stormy, the top hatches are closed, leaving the lower ones open.

It is the ship-keeper's duty to attend to the proper ventilation of the vessel, and as such ship-keeper, Captain Crosby received positive instructions from the manager of the defendant company to allow no persons on board these vessels without a written order from him or the president.

The Don M. Dickinson has three hatchways,—forward, midship, and aft; and they have the ordinary coamings of a vessel of her capacity, being about ten inches in height. On the day in question the forward hatch had been left off for the purpose of ventilation.

It is claimed by the plaintiff, and his testimony tended to prove, that at the close of navigation in the fall of 1885, Captain Crosby was promised by the defendant to be retained in its employment as captain during the season of 1886 on board the Don M. Dickinson in case she was put in commission.

It is also claimed, and the testimony tended to show, that it was the custom for captains of such vessels to engage the mate, and that on the eleventh day of March aforesaid, Captain Crosby engaged the plaintiff to sail with him as mate on the Don M. Dickinson the coming season; that the engagement was made at some place on Jefferson Avenue, and at that time plaintiff had never looked over the boat; that he went down to the boat with Captain Crosby for the purpose of looking it over; that on Adair Street they were met by two men that were buying junk, who asked Captain Crosby if he had any junk to sell. He told them to come down, and he would see if he had. They proceeded to the slip, when Mr. Crosby requested plaintiff to wait, and see which way a man turned who was in a buggy, and then come forward. The others went aboard, to do which it was necessary to ascend by

a ladder near the forepart of the ship to the upper deck, and there pass aft, and descend to the main deck through the scuttle. Plaintiff waited a minute, and then went upon the upper deck, and down through the scuttle. On reaching the main deck, he found it was all dark. The others had gone forward. He hallooed, and asked them where they were, and Captain Crosby told him to come up forward. He walked forward, and walked into the open hatchway.

The plaintiff testified that,—

“There was a coaming on the hatch that I fell in. I walked right over it. Of course, it was in the dark. I could not see. I should judge the coaming was ten inches or a foot. I never measured it; but I know about what they are. . . .

“Had been mate, and had sailed on the lake for some time, and was familiar with the boats, and the method of laying them out. . . .

“The ship was not in commission. It was lying there, and had been all winter, I suppose. That was the first I saw of her that day. I have been sailing for twelve or fourteen years, and am familiar with the boats as they are laid up. . . .

“When we ship on a boat, we generally look around to see how the boat looks. She was not fitted up then, but just as she went into winter quarters, and required considerable fitting up before she would go in commission; but I generally looked around the boat when I shipped on her,—when the captain asked me to go down to take a look at her; I would not have gone if I had not been asked to. . . .

“The Don M. Dickinson is what is called a double-decker,—with an upper and a lower deck. I was familiar with double-deckers. I worked on them; but of course I never went in there when they were shut up like this, and I did not know but what those hatches were on. I thought I could walk through there, and walk over the hatches. I did n't know the hatches were off. It was dark. I could not tell exactly where the hatches were. I could tell pretty near. Of course, I walked right over the edge of the coamings, and the hatches were off. The hatches go right on each side of the passageway, nearly on both sides, most. I was walking through the passage, and walked into the hold. That passage is probably fifteen feet wide. There were four hatches. This was the forward hatch on the starboard side. I did not see whether the other hatches were covered. . . .

"The way I walked was the usual way in walking between those decks. The middle hatch is in the center of the boat, and takes up two thirds of the main deck.

"And you know the usual way of traveling along the side of a propeller is to go by the side of the hatch,—that the hatch is always in the center of the boat?"

"A. Certainly; I know that the side of the hatch—there is not much room in the center—there is not much room in between decks; and the manner of walking,—you are just as liable to walk in the hatch as you are going in the center. Along each side of the hatches fore and aft there is a stanchion to support the upper deck. There is none forward slip. I fell in the forward hatch, starboard side."

The plaintiff's right to recover damages is based upon the negligence of the defendant.

Actionable negligence exists from an omission to perform the duty of observing due care, according to the circumstances, to prevent injury to the person or property of one who has the right to expect the duty will be performed.

It is clear to me that no negligence can be imputed to the defendant in leaving the hatch off from the hatchway of the vessel through which plaintiff fell. The act in itself involved no breach of duty. These hatchways are intended to be left open a large portion of the time when vessels are in port, and especially when they are laid up for the winter. At such seasons of the year the owner has the right to leave the hatchway open and unprotected, except by the usual coamings, and all persons walking upon the decks of such vessels are chargeable with notice of the probable presence of open hatchways on the deck. It would be preposterous to hold that the owner who places his vessel in charge of a ship-keeper during the time she is out of commission, and lying in winter quarters, is charged with the duty of building a railing around the open hatchways, or with maintaining a light to indicate danger, for the purpose of protecting persons from injury by falling into them.

It is true, the plaintiff testified that it was the custom to leave the hatches off for the purpose of ventilation; but he says that they put a railing around them so as not to make a trap for a man to fall into. I am satisfied that this testimony was intended more as an excuse for his own carelessness than to establish the fact that it was usual to protect the open hatchways by a railing. On cross-examination, he was un-

able to tell exactly when he saw a hatchway protected by such railing. He says it was a passenger-boat, in the spring of the year, when they were getting her ready for navigation, and not in the winter-time, when she was laid up. This was the only instance he ever knew of where such protection was provided. I do not think it establishes the duty contrary to what is known and recognized as the established custom: *Dwyer v. National Steamship Co.*, 4 Fed. Rep. 493.

In the case cited, the court said: "Such a duty would be burdensome in the extreme, and is not required by the law. The requirement would be unreasonable, has never been observed in practice, nor, so far as I know, declared in any adjudicated case."

That was a case of a vessel lying in port being laden for a voyage, and the injury occurred by falling through a hatchway that was defectively covered. If a ship-owner owes no duty to a party injured under such circumstances, how much less does he owe a duty to keep the hatchways covered and safe when the vessel is laid up in the winter season, when navigation is suspended, when no one has business upon her, and when she is placed in charge of a ship-keeper, whose duty is to keep the hatchways open for ventilation, and to keep all persons off the boat without they have written permission to go on board from the manager or owner.

Equally untenable is plaintiff's claim that he was invited on board, and was injured by the negligence of the ship-keeper in telling him to come forward without informing him that the hatchway was open. The ship-keeper was not authorized to invite him on board, and he did not represent the owner in calling to him to come forward; and the negligence of the ship-keeper to inform plaintiff of the open hatchway, if it was negligence, cannot be imputed to the owner. The ship-keeper was not acting in the line of his duty, but in violation of his positive orders. It was shown upon the trial that he had no authority to invite the junk-dealers on board, or to sell the junk on such vessel. But it is urged that the ship-keeper, who had been retained as captain of the vessel when she should go into commission the next season, if she was put into commission, had the authority to engage his mate, and had actually engaged plaintiff to act as such mate on the very day of the accident, and previous thereto, and that he was acting under this engagement, and induced thereby when he went on board, as he says, to inspect her. How such inspection was neces-

sary at this time before he knew whether the boat would be put in commission or not does not plainly appear. He testifies, and so does Captain Crosby, that at that time he had been retained as mate at sixty-five dollars a month; the bargain was completed; and his theory is, that he was at that time the mate, and had the right to go on board to inspect her. If this theory be true, his injury was caused through the negligence of a fellow-servant, and this would preclude his recovery.

Whether he was rightfully on or not, his own negligence contributed to the injury. He was an experienced sailor. He was familiar with the doubled-decked vessels. He knew they had the hatchways, and he knew they were liable to be open when the vessel was in port. He knew that the deck of this vessel was not a highway, and was a place where open hatchways must be maintained, and therefore to be expected and avoided: *Dwyer v. National Steamship Co.*, 4 Fed. Rep. 493; *The Helios*, 12 Id. 732; *The Victoria*, 13 Id. 43; *The Carl*, 18 Id. 655; *The Germania*, 9 Ben. 356.

With all this knowledge and experience on the part of the plaintiff, he walks carelessly forward in the dark, and says that, instead of expecting the hatchways open, and exercising care to avoid them, he expected them to be closed, and that he could walk across them. This, under the circumstances, was inexcusable negligence on his part, and a disregard of all that his knowledge and experience had or should have taught him: *The Gladiolus*, 21 Fed. Rep. 417; *The Carl*, 18 Id. 655.

We are cited to the case of *The Guillermo*, 26 Fed. Rep. 921, as being in point for the plaintiff. That was a case of an injury to a roundsman whose duty it was to see that the night-inspectors on board ship were at their posts. On visiting the vessel during the evening, the night-inspector not answering to his call, he went on board to find him. On passing along a covered passage-way which was quite dark, he stumbled upon the coamings of an open hatch leading to the coal-bunkers, and received the injuries complained of. The court said: "The libellant went upon the ship lawfully, and in discharge of his duties. The open hatch was not in the situation of the ordinary open hatches for a discharge of cargo, and such as may be expected to remain open in port, and which persons going upon the ship must avoid at their peril. This hatch was in a comparatively narrow passage-way along the side of the ship. To leave it open in a covered passage-way

which was perfectly dark, I must hold negligence in respect to the libellant, whose duties called him there."

The distinction between this case and the one before us is plain. The hatchway through which plaintiff fell was the ordinary one used for loading and unloading vessels, and was in the ordinary place, and was such as might "be expected to be open in port, and which persons going upon the ship must avoid at their peril."

The opinion serves to emphasize the carelessness of the plaintiff, when viewed in the light of his familiarity of such vessels, and the custom necessarily observed in ventilating them.

The cases and principles advanced by plaintiff to support the judgment recovered by him are familiar, but do not apply to the facts and circumstances of this case.

The occupier of premises, no doubt, is bound, as to persons thereon by his express or implied invitation, to keep the premises free from or give a warning of danger known to him and unknown to the visitor. But this rule has no application to a case where a person who, from his experience through many years in sailing a vessel, knows that it is customary to leave the hatchways of vessels open while lying in port, and whom observation teaches that they are liable to be open, rather than closed, and are sources of danger which he must avoid at his peril.

Likewise inapplicable are those cases where the injury was occasioned by defective or unsafe construction of the premises, or by careless erections thereon. No person is bound to expect that there is danger to be avoided in such cases, and they have a right to rely upon the apparent security and safety of the premises, where there is nothing in the locality or surroundings to lead them to expect peril.

The judgment must be reversed, and a new trial ordered.

NEGLECT, DEFINITION OF. — Negligence is a relative term, and implies the non-observance of or omission to perform a duty which is prescribed by law, or it arises from the situation of the parties and the circumstances surrounding the transaction: *Kelly v. Michigan C. R. R. Co.*, 65 Mich. 186; 8 Am. St. Rep. 876; *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751, and note 759; *Hays v. Gainesville St. R'y Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542.

MASTER AND SERVANT. — Master is not ordinarily responsible for the negligence of his servant causing an injury to a fellow-servant: *Peterson v. Chicago etc. R'y Co.*, 67 Mich. 102; *post*, p. 564, and note; *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 311, and note 328; *McMaster v. Illinois Central*

R. R. Co., 65 Miss. 264; 7 Am. St. Rep. 653; *Theleman v. Moeller*, 73 Iowa, 106; 5 Am. St. Rep. 663, and note 664.

MASTER AND SERVANT — VIOLATION OF MASTER'S ORDERS. — A master is not answerable for the act or neglect of his servant, when doing something which the master has not ordered done; and especially is this true when the master has positively forbidden his servant to do such act: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751; *Peterson v. Chicago etc. R'y Co.*, 67 Mich. 102; *post*, p. 564, and note.

NEGLIGENCE ON PART OF THE OWNER OF PREMISES who permits such premises to remain in a dangerous condition: See *Armstrong v. Medbury*, 67 Mich. 250; *post*, p. 585, and note.

BROWN v. BRABB.

[67 MICHIGAN, 17.]

ASSIGNMENT FOR BENEFIT OF CREDITORS. — The assignee of an insolvent debtor, in the absence of fraud in fact and of statute regulations, takes only the debtor's rights; and consequently he is affected with claims, liens, and equities enforceable as against the debtor.

AN ASSIGNEE FOR THE BENEFIT OF CREDITORS is not a purchaser in good faith. The Michigan statute relative to common-law assignments does not place the assignee upon any better footing than the creditors he represents.

ASSIGNMENT FOR BENEFIT OF CREDITORS. — UNRECORDED CHATTEL MORTGAGE made *bona fide* between the parties is valid as against the assignee for the benefit of creditors of the mortgagor, when they became creditors before the date of such mortgage, and have not been led to do or not to do anything upon the strength of non-compliance with the statute regarding the recording of such mortgages.

CHATTEL MORTGAGES — RECORDING. — The statutory provision for recording chattel mortgages is designed to take the place of delivery of the property; the object being to protect persons dealing upon credit with one who is in possession of personal property as the ostensible owner upon the faith of such ownership, from secret conveyances, by which he can obtain fictitious credit to which he would not be entitled if the true situation were known; but until such secret conveyance is given, the law has no force, and therefore does not operate upon a creditor who became such before the conveyance was executed.

M. H. Stanford, for the complainant.

Dwight N. Lowell, for the defendant.

CHAMPLIN, J. Complainant filed a bill in the Midland circuit, setting forth that January 14, 1884, John J. Ryan and Ethelbert J. Brewster, of Midland City, were doing business as John J. Ryan & Co., and on that date they made an assignment to complainant for the benefit of their creditors of all their property and rights not exempt from execution, without preference, who accepted the trust, and qualified as such

assignee, and proceeded to carry out the trust as such assignee; that on January 4th, without his knowledge, or the knowledge or consent of Brewster, Ryan, in the firm name, gave a chattel mortgage to defendant, Brabb, for \$1,928.67, covering twenty buggies, and with the usual conditions; that the mortgage was given to take up certain notes previously given, and that they never were given up; that the mortgaged property was left in the possession of Ryan & Co.; that when the mortgage was given it was agreed between Ryan and Brabb that the mortgage should be left with the township clerk, with instructions not to file, unless some other mortgage on the same property should be presented for filing, and that the clerk was so instructed; that on January 21st Brabb caused said mortgage to be filed in the township clerk's office, and demanded the property covered by the mortgage of complainant, which was refused, and that Brabb still claims property in said mortgage; that complainant claims said mortgage to be void as to him and the creditors of Ryan & Co., and believed Brabb would surrender said mortgage, or test its validity, until Brabb informed him that he would not discharge it, but insist upon the lien; that the value is over one hundred dollars; that complainant has converted the assets into money, and that he will soon be ready to distribute to the creditors; that Brabb refuses to bring suit, and insists that he shall hold complainant liable for the value of the property converted, and that he cannot distribute until the mortgage is canceled, and claims that Brabb will harass and annoy him by suits to enforce his claim at law.

The prayer for relief is to cancel the mortgage, and to restrain defendant from bringing suit, of any name or nature, against complainant, to recover the mortgage debt, and for general relief.

December 12, 1885, complainant amended his bill, setting up that the debts of Ryan & Co. were seventeen thousand dollars, and the nominal assets eighteen thousand dollars, and the true value five thousand dollars.

The defendant answers, and admits the copartnership, and denies their insolvency. He neither admits nor denies the assignment, but leaves complainant to proof of the same.

He denies that it can be material whether the mortgage of Ryan & Co. was made without the knowledge of complainant, and denies that it was made without the knowledge or consent of Brewster.

He avers that Ryan & Co. were indebted, January 4th, to the Romeo Carriage Company and to the defendant in the sum of \$2,428.67, giving the items and dates; that on January 4th such statement was taken by defendant to both partners, who assented to it, and agreed to give the chattel mortgage in question as security, which was given in pursuance of the agreement and assent of each; that Brewster, being obliged to leave by cars, assented to and directed Ryan to execute the chattel mortgage for the firm in part security, and that it was done in accordance with such agreement and direction; that in making the adjustment, Ryan & Co. agreed to give the chattel mortgage, and a real-estate mortgage on property mentioned, and to pay five hundred dollars in cash; that in consequence of Brewster being obliged to leave, the real-estate mortgage was not completed, nor the money paid, but that Ryan and wife executed the real-estate mortgage, and were only awaiting Brewster's return before completing the real-estate mortgage and payment of the five hundred dollars, when defendant was to deliver up the notes, and receipt for his claim and the carriage company's claim, and rely entirely on the security, but that Ryan & Co. never completed the real-estate mortgage or paid the five hundred dollars; that the chattel mortgage was given absolutely as part security for \$1,928.67, the real-estate mortgage was to be the additional security, and the \$500 was the balance; that on said date Ryan & Co. executed two notes, aggregating \$1,928.67, to the credit of defendant, and what was owing to him, setting out the terms of the notes, and the making of the mortgage to secure the same; that it was a *bona fide* indebtedness from Ryan & Co. to defendant, and was credited upon the account as shown Ryan & Co., leaving only the \$500 due the carriage company; that complainant knew this, and that both he and Ryan & Co. have been aware of this from the first, and until the filing of the bill never claimed differently.

That defendant is entitled to said mortgage lien and the avails of the property in complainant's hands, and that, upon the payment of the five hundred dollars, he has been at all times ready to deliver up the old account, and receipt to Ryan & Co. in full, save as to his mortgage rights.

He denies that there was any other agreement, or that the notes were to be delivered up, save upon the completion of the agreement, and says that it was understood that the notes of \$1,928.67 were to be a credit upon the old notes and account;

that defendant has been wrongfully dispossessed of the chattel-mortgage property; that complainant has sold and converted the same to his own use, and is liable to defendant for the value of the same.

He denies that any arrangement was made to deliver the mortgage to the town clerk as stated, and says that defendant took the mortgage immediately to the clerk, delivered it for filing, directed it to be filed, and paid said clerk his legal fees for filing, and did all he could to file the same, and that if it was not filed then, it was not his fault; that he subsequently learned it had not been filed, and he again directed its filing, and he denies that the failure to file was by reason of any agreement.

He neither admits nor denies the possession of complainant, but leaves him to his proofs, save that he avers that complainant has disposed of said property.

He avers that the lien was a subsisting lien to secure the \$1,928.67, and claims a decree for an accounting by complainant for the avails of said property, and to pay to defendant the sum in satisfaction of said lien.

He denies that the mortgage was in fraud of the creditors of Ryan & Co., or any other person, and claims the security, and avers knowledge of the same by complainant at the date of the assignment, and claims the affirmative relief for a decree to turn over the property, or account, and pay the moneys received therefor, and says that complainant has \$1,490 of such money, which should be ordered to be paid over to defendant.

The defendant claims the benefit of a demurrer the same as though he had demurred generally and specially.

A general replication was filed, and hearing in open court demanded. The cause was heard April 30, 1886, and a decree made February 21, 1887, granting the relief prayed for by complainant. Defendant appeals.

The assignee of an insolvent debtor, in the absence of fraud in fact and of statute regulations, takes only the debtor's rights; and consequently he is affected with claims, liens, and equities which exist as against the debtor were he asserting claim to the property. It was long ago held in England that assignees in bankruptcy take subject to whatever equity the bankrupt is liable to: *Mitford v. Mitford*, 9 Ves. 87; *Sherrington v. Yates*, 12 Mees. & W. 855; *Brown v. Heathcote*, 1 Atk. 160, 162.

Such is the prevailing doctrine in this country: *Winsor v.*

McLellan, 2 Story, 492; *Fletcher v. Morey*, 2 Id. 555; *Mitchell v. Winslow*, 2 Id. 630; *In re Griffiths*, 1 Low. 431; *In re Dow*, 6 Nat. Bank. Reg. 10; *Coggeshall v. Potter*, 1 Holmes, 75; *Johnson v. Patterson*, 2 Woods, 443; *Goddard v. Weaver*, 1 Id. 257, 260; *In re Collins*, 12 Nat. Bank. Reg. 379; *Platt v. Preston*, 3 Fed. Rep. 394; *Yeatman v. New Orleans Savings Inst.*, 95 U. S. 764; *Adams v. Collier*, 122 Id. 382.

It is held in this state that the assignee for the benefit of creditors is not a purchaser in good faith. The statute relative to common-law assignments does not place the assignee upon any better footing than the creditors he represents.

There is no question in this case but that the chattel mortgage executed by John J. Ryan & Co. was given in good faith, to secure an honest debt, and is valid between the parties.

The important question is, whether a chattel mortgage not filed pursuant to Howell's Statutes, section 6193, and valid between the parties, is equally valid and effective as against the assignee for the benefit of creditors who became such prior to the date of the mortgage.

In *Stewart v. Platt*, 101 U. S. 731, 739, the supreme court of the United States, in passing upon this question, say: "Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they are valid and effective as between the mortgagors and the mortgagee: *Lane v. Lutz*, 1 Keyes, 203; *Wescott v. Gunn*, 4 Duer, 107; *Smith v. Acker*, 23 Wend. 653. Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided. It cannot be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction for his claim for rent. The assignee took the property subject to such equities, liens, or encumbrances as would have affected it had no adjudication in bankruptcy been made. While the rights of the creditors whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belongs to the mortgagee, and not to the assignee for the purposes of his trust. The latter, representing general creditors, cannot dispute such claim, since had there been no adjudication, it could not have been disputed by the mortgagors. The

assignee can assert in behalf of the general creditors no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee."

The question arose, but was not decided, in *Putnam v. Reynolds*, 44 Mich. 113, the mortgage being held void as to creditors; it appearing in the record of that case; but not stated in the opinion, that between the date of the mortgage and the date of filing there were creditors as to whom the mortgage would be void.

The assignee is not a creditor, and as he does not stand in the position of a *bona fide* purchaser, it is difficult to see how he occupies any vantage-ground over his grantor, except as he represents the rights of creditors who have become such while the mortgage was kept off from the files. He is merely a trustee to collect and convert the assets, and distribute them among the creditors. His powers and duties arise partly from the common law, and partly from the statute regulating and enforcing assignments for the benefit of creditors.

Section 3 of that statute (Howell's Stats., sec. 8741) provides: "Every such assignment shall confer upon such assignee the right to recover all property, or right or equities in property, which might be reached or recovered by any of the creditors of such assignor."

Under this section, he doubtless would be authorized to recover property conveyed by the assignor in fraud of his creditors, and perhaps equitable interests or things in action secreted or conveyed by the assignor in fraud of his creditors. But when the unrecorded mortgage is *bona fide*, and made without fraudulent intent, it is valid as against all creditors except those who have become such while it remained unrecorded. The other creditors could not reach it, and consequently this section of the statute would not empower the assignee to recover the property covered by it.

The difficulty in obtaining a clear perception of the rights of the assignee has arisen in the mistaken view that an unrecorded mortgage is absolutely void as to all creditors. It must be confessed that the language used in many decisions has led to this conclusion. In most cases, however, if not in all, such language has been applied to those cases where the creditors referred to were those who became such while the mortgage was unrecorded. Thus in *Thompson v. Van Vechten*, 27 N. Y. 582, Chief Justice Denio says: "But it was the ap-

parent, and I think the real, object of the act to prevent the setting up of secret mortgages against persons who might deal with the mortgagor on the faith that his property was not thus encumbered. It is true, the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property; for creditors cannot interfere with the property of their debtor without process. But when they present themselves with their process, they may, I think, go back to the origin of their debt, and show, if they can, that when it was contracted the encumbrance with which they are now confronted existed, and was kept secret by being withheld from the proper office."

This case is cited in brief of counsel as authority to show that an unfiled mortgage is absolutely void. A careful reading of the case would have shown the limitation which, when the facts are disclosed, governs such cases.

The distinction was noticed and the principle again stated in *Parshall v. Eggert*, 54 N. Y. 18, 22. It was there said: "If the instrument under which the plaintiffs claimed were a chattel mortgage, it would be void as against the right of Hunter, the creditor, whom the defendant, the sheriff, represents, inasmuch as the instrument had not been filed when the debt of Hunter was created. For this position, the case of *Thompson v. Van Vecten*, 27 Id. 581, is a direct authority. It was there held that the time when the creditor became such fixed the rights of the parties; that a mortgage not then filed was void as to him, although he should not then be in a position to at once attack its validity."

The distinction was again clearly made, and the doctrine applied, in the case of *Stewart v. Beale*, 7 Hun, 405, and affirmed in 68 N. Y. 629, upon the opinions written in 7 Hun, 405.

The case of *Wilson v. Esten*, 14 R. I. 621, is, in many of its features, a parallel case to the one under consideration. There a mortgage was given in good faith to secure a loan of money to enable the mortgagor to start in business. It was dated May 5, 1883, but was not recorded. The statute declared that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," etc.

On January 14, 1884, the mortgagor executed a voluntary assignment for the benefit of his creditors. The assignee went on and sold the property covered by the mortgage, and paid the money received therefor into the registry of the court, where it was claimed by the general creditors, and also by the mortgagee. The general creditors claimed that the neglect to have the mortgage recorded operated as a fraud upon them, because, in consequence of the neglect, they gave credit to the mortgagor which otherwise they would not have given, and therefore that they were entitled to the fund. The court found, from the testimony, that the neglect to record the mortgage was unintentional, and that the lien of the mortgage was not affected by the failure to place it upon record.

The court said: "The creditors contend that they are entitled to the fund because the mortgage, being unrecorded, is valid only between the parties to it. The creditors, however, show no right to the fund which they can enforce in this case, unless they are entitled to it under the assignment; and the question, therefore, is, whether the assignee, as trustee for them, has acquired a right which is superior to the mortgage, or has simply succeeded to the right of his assignor, which is subject to it. There can be no doubt that ordinarily, where there is no statute to add to the effect of the assignment, a voluntary assignee succeeds simply to the right of the assignor."

And the court held that, as they had no statute in that state adding to the ordinary powers of a voluntary assignee, the mortgagee was entitled to the money, for the reason that the mortgage was good between the parties, and the assignee occupied no better position than his assignor.

In *Shaw v. Glen*, 37 N. J. Eq. 32, the firm of James M. Shaw & Co., creditors of John H. Marrin, took from him, on October 17, 1882, a chattel mortgage to secure a debt of \$375. Marrin resided at Elizabeth, in Union County, but the mortgage was, two days after its date, by mistake, recorded in Essex County, where the goods were, and where they supposed the mortgagor resided.

December 28, 1882, Marrin executed a voluntary assignment to defendant, Glen, for the equal benefit of his creditors, under the assignment act. The assignee at once took possession of the goods then in the mortgagor's hands. Soon after that, the mortgagees discovered their mistake, and recorded their mortgage in Union County. The mortgage was given in

good faith in all respects. The suit was brought to foreclose the chattel mortgage. The case is so clearly in point that I feel justified in quoting the opinion of the chancellor. He says: "The defendant, the assignee, insists that the mortgage is void as to him because it was not recorded in Union County, where the mortgagor resided when it was made, before the assignment to him was delivered. The act provides (Pamph. Laws of 1881, p. 227) that any mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, made after the approval of that act, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless recorded according to the directions of the act, which are, that it be recorded in the clerk's or register's office of the county where the mortgagor resides, if he resides in this state, but if he does not reside in this state, then it is to be recorded in the clerk's or register's office of the county where the property is at the time of executing the mortgage. But the mortgage was clearly valid, as against the mortgagor, when he made the assignment, notwithstanding it had not been recorded according to law: *Nat. Bank v. Sprague*, 20 N. J. Eq. 13; and the assignee took his title to the property subject to the equities to which it was subject in the hands of his assignor. Such is the rule as to assignees in bankruptcy. Such an assignee is not bound by the fraudulent conveyances of his assignor: *Pillsbury v. Kingon*, 33 Id. 287; 36 Am. Rep. 556; but in cases unaffected by fraud, he is bound by the equities to which the property assigned was liable when it came to his hands from his assignor: *Mitford v. Mitford*, 9 Ves. 87; *Winsor v. McLellan*, 2 Story, 492; *In re Gregg*, 3 Nat. Bank. Reg. 131. And this rule has been repeatedly applied in mortgage cases like the present: *In re Griffiths*, 3 Id. 179; *Potter v. Coggeshall*, 4 Id. 19; *Stewart v. Platt*, 101 U. S. 731. The same just rule is on every principle obviously applicable to assignees under the assignment act. The failure to record the mortgage does not render it invalid as against the defendant."

The rule laid down in this case does not conflict with that which treats the assignee as the representative of creditors for all purposes of attacking conveyances made in fraud of creditors. *Pillsbury v. Kingon*, 33 N. J. Eq. 287, 36 Am. Rep. 556,

lays down this rule, and supports it with satisfactory reasoning and upon authorities cited. See also *Schaller v. Wright*, 70 Iowa, 667, where the supreme court of Iowa held the assignee of an insolvent estate represents the creditors, and that the title to property fraudulently conveyed vests in him.

Turning now to decided cases in our own state, we observe that many cases are decided merely reciting the language of the statute declaring unfiled chattel mortgages void as to creditors, without stating whether the demands of the creditors existed before or after the date of the mortgage. Such are the cases of *Hurd v. Brown*, 37 Mich. 484; *Haynes v. Leppig*, 40 Id. 602; *Cooper v. Brock*, 41 Id. 488; *Putnam v. Reynolds*, 44 Id. 113; *Wallen v. Rossman*, 45 Id. 333.

Commencing with *Fearey v. Cummings*, 41 Mich. 376, which precedes in date some of the cases cited above, the court, on page 383, say: "If the mortgage was made with intent to hinder, delay, and defraud creditors, or inasmuch as the possession was not altered, if it was not put on file prior to plaintiffs becoming creditors, it was invalid as against them; the law being that those who become creditors whilst the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing. Still, no one as creditor at large can question the mortgage. He can only do that by means of some process or proceedings against the property."

In *Waite v. Mathews*, 50 Mich. 392, the mortgages were filed by mistake in the wrong township. The defendant was a United States marshal, and represented creditors whose debts were older than the mortgages. The chief controversy was upon the validity of the mortgages as against the creditors whom he represented. The court below held that the mortgages were absolutely void, as matter of law, for want of immediate possession.

This court said: "The other question was substantially decided in *Kohl v. Lynn*, 34 Mich. 360, and *Fearey v. Cummings*, 41 Id. 376, where it was distinctly intimated that in order to justify the application of the statute making mortgages, whether honest or not, absolutely void for want of filing or possession, some act must be done, or some detriment sustained, during the interval. As against all such rights, a mortgage without such possession or filing is absolutely, and not merely presumptively, void; while conveyances not by way of mortgage are only presumptively void under such cir-

cumstances [citing cases]. The case of *Wallen v. Rossman*, 45 Id. 333, where a different rule is claimed to have been given, was one where the debt was incurred subsequently to the date of the mortgage, as appears by the original record; the facts not being set out in the report. . . . It is to be remembered that filing in the proper office is equivalent, for saving purposes, to actual delivery of property; and this is often delayed by mistake as to the proper office, or by other causes involving no fraud. Rules so stringent as to destroy honest transactions by such omissions must have a reasonable application. The object of the statute is to prevent, and not to facilitate, fraud; and such a construction as was adopted below would not, in our opinion, tend to good. We do not mean to decide that creditors who have actually been damaged by reliance on the title being clear to postpone action may not be protected."

In *Talcott v. Crippen*, 52 Mich. 633, the bill of sale, which was treated as a mortgage, was dated April 6, 1882, and was filed August 10, 1882. The property was attached August 11, 1882, to recover demands created between February 9 and August 3, 1882. Held, as to these creditors, the mortgage was void.

In *Crippen v. Jacobson*, 56 Mich. 386, the mortgage was dated May 9, 1884, and purposely not recorded until May 15, 1884, when the mortgagee took possession, and sold the goods mortgaged. He was garnished at the suit of creditors who had become such after the date, and before the filing, of the mortgage. On page 389, Mr. Justice Campbell, giving the opinion of the court, said: "We have heretofore held that a chattel mortgage not seasonably filed is void, and not merely presumptively void, against creditors whose rights intervene between the making and filing. . . . When the debt is not incurred on the credit of an apparently clear title, which is in fact covered by a secret mortgage, the cases cited hold that there is no right to complain of a subsequent mortgage without taking some steps which puts the creditor on a different legal footing than that of a quiescent party. But when a chattel mortgage exists, and is concealed, it is, under the statute, void, for the reason that it produces a false appearance of solvency, when in fact a person known to have mortgaged his stock would not be as likely to get credit as one who had given no such security; and those who deal with such a debtor are liable to be defrauded by appearances. One who gives

credit under such circumstances is necessarily exposed to that mischief, and the law has removed all questions of suspicion or notice by making chattel mortgages void,—at all events against creditors who deal with a debtor so situated. Such creditors are directly within the policy of the statute.”

The language of the statute contains no qualification as to the time the creditors become such. It does not say that the unfiled mortgage shall be void as to subsequent creditors, and this has led some courts to hold that it is void as to all creditors. But a qualification is plainly implied from the language of the whole section, considered with reference to the object of the law.

It must be remembered that the filing is designed to take the place of the delivery of the property. The object of the law is to protect persons dealing upon credit with one who is in possession of personal property as the ostensible owner, upon the reliance of such ownership, from secret conveyances, by which he is enabled to obtain a fictitious credit to which he would not be entitled if the true situation were known. Until such secret conveyance is given, the law has no force. There is nothing for its provisions to operate upon, and the creditor has the protection of the ordinary remedies for the enforcement of his demands. These are not enlarged by the statute, and no new rights or remedies are conferred upon the creditor. To him it makes no difference whether the debtor sells, mortgages, or gives away his property, either secretly or openly, unless it is done with intent to defraud him. His remedy to reach the property conveyed depends entirely upon the fraudulent character and intent with which the debtor has conveyed it away. As to him, the debtor may secure another person by delivering the property to him, followed by a continued change of possession; in which case he would not be likely to extend any further credit.

But suppose, instead, his debtor gives a mortgage in good faith, to secure an honest debt, to another creditor, or for a present consideration, for a loan of money. There is nothing in the quality of these acts by which he is injured. There is no legal wrong done him. Nor is there any legal wrong done him if the mortgage is kept secret or unfiled, unless he has thereby been led to extend new credit or further time, or been led to abstain from taking action to collect his debt, in ignorance of the real situation.

It would seem unreasonable that, without extending any

new credit or otherwise suffering loss on account of the mortgage being kept from the files, or being filed in a wrong place, he could be permitted to say that the mortgage is void as to him, and that he would attach the property, and deprive the holder of his security, simply because he had failed to comply with the law. He has not been led to do or to omit doing anything upon the strength of such non-compliance with the statute.

And herein lies the difference between his case and the innocent purchaser or encumbrancer under the recording laws. These protect subsequent purchasers and encumbrancers in good faith who have been led to rely upon the record title. To my mind, the reason why the word "subsequent" was not inserted in the statute before the word "creditors" was to meet just that contingency where an existing creditor might suffer injury by relying upon the apparent situation, and so be damaged by postponing action, or extending time of credit already given, or possibly in some other manner.

The complainant has not shown that he represents any creditor who is in a position to challenge the validity of defendant's mortgage, or claim the benefit of the statute as avoiding it, because of its not having been filed seasonably. We must therefore deny him the relief which he asks.

The answer prays affirmative relief, and defendant is entitled to it at our hands. The testimony shows that the property was sold by the consent of defendant, and that he reserved his claim upon the fund. The gross amount realized from the sale was \$1,490. The testimony shows that it cost about ten per cent to dispose of it, and that the assignee guaranteed the buggies on the sale, and many came back for repairs. The assignee paid out for such repairs \$104.40. This amount, with the expense of sale (\$149), must be deducted from the \$1,490, leaving \$1,236.60, which complainant must pay to defendant as the net avails of such property.

The decree of the circuit court must be reversed, and a decree entered here in accordance with this opinion. The taxable costs of both parties will be paid by the assignee out of the other funds in his hands.

In *Dwight v. Scranton and Watson Lumber Co.*, 67 Mich. 507, it appeared that the defendant company was a corporation organized under the laws of Michigan, and on August 19, 1886, executed a common-law assignment, without preferences, to one Dewey, for the benefit of its creditors. He failed to qualify, and defendant Stebbins was appointed receiver to execute

the trusts of the assignment. The above-named corporation consisted of J. P. Scranton, H. M. Mixer, and J. E. Watson, and prior to the date of incorporation, Scranton and Mixer carried on a lumber business as partners under the firm name of Scranton & Co., Watson being also engaged in business in another town in the state. When the corporation was formed it was agreed that Scranton & Co. should put into the corporation, as assets, the capital of the firm, the corporation agreeing in return to assume the debts and liabilities of the firm, and the same arrangement was made as to the debts and assets of Watson. Scranton & Co. were indebted to one Mary W. Whipple in the sum of five thousand dollars, and this debt the corporation promised to pay. This debt was evidenced by notes signed by Scranton & Co. and indorsed by "Scranton and Watson Lumber Company." On August 18, 1886, the corporation executed a chattel mortgage to Whipple to secure this indebtedness, and the mortgage was filed for record August 19, 1886, at 8:55 o'clock, while the assignment was made at 9:10 o'clock the same day, although the preparation of the last document was commenced the previous day, but not completed until the following morning, when Dewey, the assignee, joined in the execution of the document. From all that is shown, it appears that the corporation intended to make the assignment at the same time that it made the mortgage, thus making it substantially one transaction, and the two instruments contemporaneous in time of execution to all intents and purposes. In all of the transactions between Scranton & Co. and Miss Whipple, Mrs. Mixer, wife of H. M. Mixer, above mentioned, acted as the representative of Whipple, made the loans, received the interest, and was the custodian of the notes. Miss Whipple says she did not know nor expect that the assignment was contemplated, but that she had spoken to Mrs. Mixer, telling her that she wanted security for her money. Mr. Mixer, after being spoken to about it by his wife, promised that the security should be given. This he was willing to give, but Scranton objected, as doing so would injure their credit. Mixer, before he delivered the mortgage, told his wife of the embarrassment of the corporation, but did not tell her that they intended to make an assignment. The chattel mortgage was executed in the corporate name by Scranton and Mixer. Watson was not consulted, and did not consent. Though there was no meeting of directors, nor corporate action taken by resolution or otherwise, there had been a resolution adopted giving general authority to Scranton and Mixer to manage and conduct the business.

On this state of facts, Champlin, J., delivering the opinion of the court, said: "The statute forbids, because it prohibits, any debtor who makes a common-law assignment from preferring one creditor over another. It also forbids any such assignment, unless it be of all the debtor's property, except such as is exempt from execution. As we have before said, the main object of the statute is to prevent a failing debtor from preferring one creditor over another, and to insure an equal distribution of the debtor's property among all his creditors. It is, however, neither an insolvent nor a bankrupt law. It affords no discharge to the debtor who has surrendered all his property to satisfy the claims of his creditors. It does not declare preferences by way of payment or security before making the assignment void. It provides no means by which the assignee can recover from a creditor so preferred payments made or property pledged. The greatest extent to which the law goes is to authorize the assignee to recover all property, or right or equities in property, which might be reached or recovered by any of the creditors of such assignor. This does not authorize the assignee to recover a payment made by way of preference to a *bona fide* creditor before the assignment, nor

to attack the validity of a mortgage given to secure the payment of a *bona fide* indebtedness. No creditor could successfully attack such mortgage if the assignment had not been made; and unless prohibited by law, a debtor has a right to secure a *bona fide* indebtedness to his creditor, although such act may operate to prefer him over other of his creditors. The law does not declare such preferences fraudulent; they are not fraudulent in fact. Preferences are void only in common-law assignments because forbidden by statute. The statute inhibits the debtor from preferring a creditor in the instrument. If it is done by another and separate instrument contemporaneous with the assignment, it can only be held void as an evasion of the law by the parties to the instrument. The purpose must be mutual by the mortgagor and mortgagee; for no matter what the intent of the mortgagor is with reference to evading the law or committing a fraud upon it, such intent cannot affect the validity of a security otherwise valid, given to a person who is innocent of such intent, and who does not knowingly participate therein"; citing, in support of this rule, *Heineman v. Hart*, 55 Mich. 76; *Root v. Potter*, 59 Id. 498; *Sweitzer v. Higby*, 63 Id. 13; *Field v. Fisher*, 65 Id. 606. The learned judge then states that, in effect, the law is but little better than a dead letter, owing to an absence of statutory enactments necessary to carry its intent into effect, and thus secure an equal distribution of the property of the debtor among all his creditors, and to recover preferences intentionally made to evade its provisions; that in this case no doubt exists that the debt existing against the corporation was *bona fide*, — one which it had a right to secure, had assumed, and was under obligation to pay. In conclusion, the court said: "The chattel mortgage appears to us to be a valid instrument, and was received by the petitioner without notice or knowledge that the corporation or its officers intended to make a general assignment for the benefit of its creditors. It was therefore a valid security in her hands; and under the stipulation made in the case whereby she consented to the sale of the property by the receiver, and that he should hold the fund subject to her lien, if established, she is entitled to payment of her mortgage debt out of such fund; and the decree of the court below should be affirmed." In this opinion Sherwood and Morse, JJ., concurred.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. — In accord with the principal case, it has been held that assignees for the benefit of creditors are not *bona fide* purchasers: *Clark v. Flint*, 22 Pick. 231; 33 Am. Dec. 733, and note 740; but it has also been held that assignees for the benefit of creditors are *bona fide* purchasers: *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390, and note 396; *Root v. French*, 13 Wend. 570; 28 Am. Dec. 482.

ASSIGNEE FOR THE BENEFIT OF CREDITORS cannot impeach a chattel mortgage on the mere ground that it was not filed pursuant to a statute for the protection of subsequent *bona fide* purchasers for value: *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480, and note 483.

CHATTEL MORTGAGES. — Registration of a chattel mortgage dispenses with delivery of the mortgaged property: *Oall v. Gray*, 37 N. H. 428; 75 Am. Dec. 141; *Golden v. Cockril*, 1 Kan. 259; 81 Am. Dec. 510; *Kanaga v. Taylor*, 7 Ohio St. 734; 70 Am. Dec. 62.

PETERSON v. CHICAGO AND NORTHWESTERN R'Y Co.

[67 MICHIGAN, 102.]

MASTER AND SERVANT — NEGLIGENCE — DUTY OF RAILROAD COMPANY TO EMPLOYEES. — A rule of a railway company requiring all car-inspectors and repair-men, before they go under or between any cars to inspect or repair them, to first display a red signal on the end of a car or cars in the direction from which a train or engine could approach, requiring them to provide themselves with such signals, obtained from their foreman, and to have them on hand at all times for use, and also requiring that all train-men must carefully observe such rule, and under no circumstance back against or couple onto any car while such signal is displayed, — is adequately sufficient, if enforced, for the protection of car-inspectors and repair-men, and relieves the company of negligence in not having a watchman or "bumpers," and in running other cars upon the same track, where cars were being repaired, when space was left between them, and the red signal was respected according to the rule.

MASTER AND SERVANT — NEGLIGENCE OF FELLOW-EMPLOYEES. — An employer is not liable for the negligence of fellow-employees, in the absence of proof that the latter are incompetent in such sense as to charge the employer with the results of their negligence.

MASTER AND SERVANT — FELLOW-EMPLOYEES. — A railroad-foreman, a railroad-yard boss, and an engineer of a switch-engine are fellow-employees.

Hayden and Young, for the appellant.

A. B. Eldredge, for the defendant.

MORSE, J. The plaintiff is a native of Sweden, and on the sixth day of June, 1884, the date he was injured, was about twenty-six years of age. He was employed by the defendant as a car-repairer, and worked in such employment for it from five to six weeks before he was hurt. He was hired by one Matthews, who was the boss-carpenter of the defendant. Matthews directed him to report to John Carlson, who was foreman of a gang of car-repairers. He was told that Carlson would show him what to do. He had never worked at car-repairing or any other labor about railroads before. He had been in this country less than two years, and understood but little of the English language.

Upon his reporting to Carlson, he was given a tool-box, and set to work repairing cars; putting in bolts, plates, and the like items of repair. He testifies that the only instructions or warning given him as to the danger of his occupation was that he should never go under the cars "when the red flag was not on."

The accident which occasioned the injury for which the plaintiff seeks to recover damages in this suit occurred in the

lower yard of the defendant at Escanaba, where are located the ore-docks, from which the iron ore mined near there is loaded into vessels. There were in this yard ten tracks, all of which were used more or less as repair-tracks. The method of doing business in the yard was substantially as follows: After the loaded cars had been run down from the docks, they were switched onto side-tracks, and were then inspected by the repairers. The cars that were too much damaged to be repaired upon the tracks were marked "B. O." (meaning bad order), and were removed to the shops before the train started out. The others needing repair were attended to while standing on the repair-tracks.

These same tracks were also used for making up trains. The repair-men were furnished with red flags, one of which was to be placed at the head of the train looking towards the switch, and train-men were instructed in no case to run cars or engines against such cars, as the signal of the red flag so placed indicated that such cars were undergoing repair upon the track.

There were two repair-yards; one called the upper and the other the lower yard. The foreman of both yards was Thomas Leith. In his absence, John Carlson was boss of the lower yard.

On the day of the injury, from thirty to thirty-five cars were run in from the ore-docks upon one of these tracks, known as track No. 4. They were backed in from the north, and had at their south and rear end a caboose. Peterson had been at work all day, commencing at seven o'clock in the morning. The car-repairers, including plaintiff, about three o'clock in the afternoon had just completed repairing cars on a train standing upon another track, when Carlson said, "Come on, boys," and led the men to the cars on track No. 4. He said, "Boys, hurry up, now; we have to leave in half an hour"; and put a red flag up on the front car of those then being on the track. The men went to work at once, and as fast as they could. Peterson finished his work on one car, and passed by Carlson, who was fixing a brake-beam on one of the cars, and went to work on another car. He was sitting on the ground under the car, fastening the nuts upon some bolts.

While the men were thus engaged upon these cars, another train, consisting of thirty or thirty-five cars, was backed down upon this same track within from one to six car-lengths of the train being repaired. Carlson knew of this, but did

move or change the flag. He swears that Leith, the other foreman, and one Oscar Strom had gone ahead, and he supposed that they had moved the flag to the front end of the last train, or would do so; therefore he kept on at work, and paid no attention to the matter. The flag was not changed.

While these two sections were standing on this track, Oscar Strom, a car-repairer, and one of the gang under Carlson and Leith, passed along the section last placed upon the track, and inspected the cars. He marked one "B. O." (bad order). This car was about the sixth one from the front end of the section. Sylvester Geiger, a brakeman, going out that day, came through the yard, and seeing this B. O. car, pulled the pin connecting it with the rear cars. He spoke to Murray, the yard-master, about it, and Murray ordered the switch-engine to take this car out. One Farnum, who was not a witness upon the trial, was running the switch-engine. He attached the engine to the first section, and ran the detached cars out upon another track, and the B. O. car was "kicked" upon it. He then ran the remaining five cars back upon track No. 4. As soon as he did this, he detached the engine from them. Geiger was on top of the cars, and supposed the engine was still attached to them. When he got near the rest of the section, to which he intended to couple these cars, he gave a signal for the engine to slow up. Discovering that the engine was not attached, when within about two car-lengths of the section, he jumped off and ran ahead to make the coupling. He testifies: "They [the cars] just about got up with me,—they don't run very fast,—kept just about up with me; then somebody hallooed at me to get out, and I was kind of scared, so I got out, and lost the coupling, and they struck, and run the others down against the thirty cars these car-repairers were working under."

Without any warning to plaintiff, the car which he was under lunged back over him, dragging him on his back across his tool-chest, injuring his shoulder and spine, from which injury he claims a probable permanent disability.

The testimony shows that it was not the duty of the plaintiff to move this flag, and he had been forbidden to touch it. The men having properly the charge of it were Leith and Carlson.

No one else was authorized to touch it except by their order.

In the plaintiff's declaration, the causes of negligence upon

the part of the defendant were alleged as follows: 1. That defendant should have provided a watchman to warn plaintiff of the movement of the cars, and notify other employees of his whereabouts; 2. That a proper signal-flag should have been used to give notice of his presence under the cars; 3. That the cars under which he was working should have been "locked," or placed against a "bumper," or stationary post; 4. That defendant neglected to provide such watchman, flag, or bumper; 5. The defendant neglected all reasonable means to prevent the movement of the cars while plaintiff was at work under them; 6. Defendant negligently required the cars to be repaired on an open track, upon which engines or cars might be run while plaintiff was at work; 7. And negligently exposed plaintiff to the risk from the movement of the cars; 8. That while plaintiff was under the cars, and in the absence of such precautions, without any warning to him, defendant wrongfully caused a number of cars to be pushed in upon the track where plaintiff was at work, by locomotive power, at a high rate of speed, unattached to the locomotive, and insufficiently provided with brakemen.

The proof showed that no watchman or bumpers were provided, and no signal used except the red flag, which would undoubtedly have answered the purposes of a sufficient signal had it been removed to the front end of the section last run upon the track.

Upon the conclusion of the testimony, the circuit judge directed a verdict for the defendant, holding,—1. That the injury was caused by the neglect of Carlson or Leith to remove the flag from the rear section, and place it at the head of the front section of the cars upon the track; 2. From the neglect of the switchman, Farnum, to perform his duty; that he had no business or right to uncouple the cars from the engine as he did.

He then ruled that, inasmuch as there was no evidence offered or claim made that either Carlson, Leith, or Farnum, were incompetent, the plaintiff could not recover, because all these parties were, in law, fellow-employees with the plaintiff.

It is claimed by the counsel for the plaintiff that it was negligence on the part of the defendant to run the last section of cars upon the track while the others were being repaired, and had the signal-flag at the front of them; that the evidence shows it was their custom to do so, the only instructions being to leave space between the cars being repaired; and

that the plaintiff had a right to go to the jury upon this question.

His counsel assert that the primary cause of the injury was the existence of the rule or custom to permit encroachments upon the track, or a want of sufficiently definite rules to govern the use of the signal-flag, or both combined.

The testimony shows that the following rule was in force, and had been for some time before the accident. There was a dispute in the testimony as to whether or not notices of this rule were posted up while plaintiff was in the employ of defendant. But there is no question, from the record, but the instructions of the defendant were that the red flag should be placed at the front end of the cars on the repairing track, and that in no event should any train be run against cars having such flag upon them.

The following is a copy of said notice:—

“CHICAGO & NORTHWESTERN RAILWAY COMPANY,

“OFFICE OF THE GENERAL SUPERINTENDENT.

“*General Notice.*

“CHICAGO, October 27, 1881.

“Hereafter it is made the duty of all car-inspectors and repair-men, before they go under or between any cars to inspect or repair the same, to have first displayed a red signal on the end of car or cars in the direction from which a train or engine could approach.

“All train-men must carefully observe this notice, and under no circumstances must they back against or couple onto any car while such signal is displayed.

“Car repair-men and car-inspectors must provide themselves with such signal, which can be obtained from their foreman, and have them on hand at all times for use.”

I think it must be considered that this rule, if enforced, was adequately sufficient for the protection of plaintiff, and the men working at the same employment. A similar method of protection is adopted by other roads, and has in one case been judicially determined to be “a very efficient rule, and if faithfully and carefully observed, would give reasonable protection to repair-men”: *Abel v. President etc.*, 103 N. Y. 586; 57 Am. Rep. 773.

With this rule in existence, and with instructions to all employees to observe it, it was not, in my opinion, negligence on the part of the defendant in not having a watchman or “bumpers”; nor was it negligent to run other cars upon the same

track where cars were being repaired, when space was left between them, and the red flag was respected according to the rule.

While the negligence of Farnum, in detaching the engine from the cars used in "kicking" the B. O. car upon the main track, had something to do with causing the accident, the real neglect which was the main cause of the injury was the failure of the foremen, or one of them, to remove the flag, and place it at the head of the front section of the cars upon the repair-track. If this had been done, none of the cars would have been moved while plaintiff or any of the men were at work repairing the cars if the rules of the defendant had been obeyed.

As stated by the circuit judge, there could be no claim, from the record, that either Farnum, Leith, or Carlson were incompetent men in such sense as to charge defendant with the results of their negligence. If the question were an open one in this state, I should not be inclined to hold that either of these persons was a fellow-employee of the plaintiff. But the law in this respect is well settled in this state, and the circuit judge followed the decisions of this court, citing them in his charge to the jury: See *Railroad Co. v. Dolan*, 32 Mich. 510; *Smith v. Potter*, 46 Id. 258; *Railroad Co. v. Austin*, 40 Id. 247; *Mining Co. v. Kitts*, 42 Id. 34; *Greenwald v. Railroad Co.*, 49 Id. 197; *Gardner v. Railroad Co.*, 58 Id. 584; *Hoar v. Merritt*, 62 Id. 386.

Under the plaintiff's evidence, and the other undisputed facts in the record, and the law applicable to the same, the judgment of the court below must be affirmed.

MASTER AND SERVANT — WHO ARE CO-SERVANTS OR CO-EMPLOYEES: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note 75; *Ewald v. Chicago etc. R'y Co.*, 70 Wis. 420; 5 Am. St. Rep. 178, and note; *Theleman v. Moeller*, 73 Iowa, 106; 5 Am. St. Rep. 663, and note; *McMaster v. Illinois etc. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note 667; *Fisk v. Central P. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 31-33. An engineer is a fellow-servant of a brakeman, where, being deprived of their conductor, both pursue, independently of each other, the duties prescribed by the rules of the railway company in such emergency: *Louisville etc. R. R. Co. v. Martin*, 87 Tenn. 398, and cases there cited. Where A was employed in a blacksmith-shop of a locomotive and machine works, and upon the direction of an officer of the company repaired a chain which had been used in raising locomotive driving-wheels, to be worked on by B, employed by the works for that purpose, and when the chain was again furnished to and used by B for that purpose, and B was injured by its breaking at the link which had been repaired, A and B were fellow-servants in a common employment:

Rogers etc. Works v. Hand, 50 N. J. L. 464; compare *Handelan v. Burlington etc. R'y Co.*, 72 Iowa, 709.

MASTER AND SERVANT — MASTER'S LIABILITY FOR INJURIES TO SERVANT BY NEGLIGENCE OF CO-SERVANT. — The general doctrine that a master is not liable for injuries caused by the negligence of fellow-servants engaged in the same common employment is now regarded as settled law: *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 311, and note 328; *Ewald v. Chicago etc. R'y Co.*, 70 Wis. 420; 5 Am. St. Rep. 178, and note 187; *Theleman v. Moeller*, 73 Iowa, 106; 5 Am. St. Rep. 663, and note 664; note to *Faren v. Sellers*, 4 Am. St. Rep. 264; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; 3 Am. St. Rep. 92, and note 106; *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note 31-33; *Ashley v. Hart*, 147 Mass. 573; *Dunlap v. Barney Mfg. Co.*, 148 Mass. 51. But there are exceptions to this general rule that a master is not liable to one servant for an injury resulting from the negligence of a fellow-servant: *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; 3 Am. St. Rep. 92; and it is settled that the master is liable when he has, through negligence, selected and employed a servant who is totally incompetent: *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 311; *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458, and note 465; *McMaster v. Illinois etc. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note 657; *McKinnon v. Norcross*, 148 Mass. 533. Nor is the master responsible for the mere personal negligence of a superior servant to an inferior servant; and in order to render the master liable for the consequences of the superior servant's negligence, the latter must so far stand in the master's place as to be charged, in the particular matter from which the injury results to the inferior servant, with the performance of some duty which, under the law, the master owes to such servant: *Louisville etc. R. R. Co. v. Lahr*, 86 Tenn. 335.

MASTER AND SERVANT — VIOLATION OF RULES. — When an injury is received by one in the employ of another, while engaged in the performance of a service for his employer, but which is rendered in a manner violative of the rules of the employer, no damage can be recovered from such employer: *Pilkinton v. Gulf etc. R'y Co.*, 70 Tex. 226; *Cincinnati etc. R'y Co. v. Lang*, 118 Ind. 579.

MASTER AND SERVANT — RULES. — A railway company must promulgate rules for the protection of its employees against one another's negligence: *Abel v. President*, 103 N. Y. 581; 57 Am. Rep. 773; *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631, and note 638.

PERRY v. CITY OF BIG RAPIDS.

[67 MICHIGAN, 146.]

TAXATION — ABSTRACT-BOOKS NOT SUBJECT TO. — The Michigan constitution requiring that property shall be assessed at its cash value means, not only such property as may be put to valuable uses, but also such as has a recognizable cash value inherent in itself, and not enhanced or diminished according to the person who owns or uses it. Books of abstracts of title have no intrinsic value, and are only valuable for the information they contain, conveyed by consultation or extracts, hence they are not subject to taxation.

M. Brown, for the plaintiff, appellant.

Austin Herrick, for the appellee.

CAMPBELL, C. J. Plaintiff sued to recover taxes paid under protest, for which the tax collector was proceeding to collection under his warrant.

The taxes were levied in 1885. The supervisor had assessed plaintiff for three hundred dollars upon the contents of his office, to which plaintiff did not object. When the board of review met, that body, of its own motion, and without testimony, raised the assessment to eighteen hundred dollars, doing so upon the claim that certain abstract-books referring to land titles in Mecosta County should be taxed at that rate. After raising the assessment, plaintiff was notified of it, and appeared by counsel to object to it, but the board refused to change the enlarged rate.

While some question may exist as to the validity of this action in the manner in which it was had, we do not propose to discuss that, inasmuch as the subject-matter which they proposed to assess in that way was not subject to their jurisdiction.

The constitution requires assessments to be made on property at its cash value. This means, not only what may be put to valuable uses, but what has a recognizable pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it. The court below found expressly, and could not have found otherwise, that these abstract-books have no intrinsic value. They are only valuable for the information they contain, and that information is conveyed by consultation or extracts. Their value is only kept up by their completeness and continued correction. The sale of a complete copy would practically destroy the value of the books in the hands of the plaintiff. So a similar compilation by any one else would have a like result. The value of the books, except as used, is nothing. They resemble in nature, if not precisely, the books which are consulted by any person who makes an income from his acquired knowledge, whether scientific or otherwise; as a surveyor's notes, an author's memoranda, a druggist's recipes, and many analogous things. They may be and are very serviceable, but they are not things that the law has made subject to seizure or assessment. If these books were taxable as personalty, they could be made liable to satisfy it, and this, in our opinion, cannot be done.

As the whole subject was discussed and disposed of in *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, it does not seem necessary to rehearse or review what was there held. All civilized governments respect private manuscripts, and treat them as not partaking of the nature of property open to ordinary sale and disposal. The possession of them gives no right in the possessor to use them, or publish them, unless by the acquiescence of the originator. While it often has happened that trade secrets, and other information which has been noted down in writing, may furnish means of acquiring profit, it was never imagined or held that the writings themselves were subject to seizure and sale without consent. Any attempt to make value out of such a sale would be really a sale of knowledge, and not of property.

Whether the tax laws do or do not include things resembling these books in their nature we need not inquire, although none such have been pointed out. If they do, it is probably through inadvertence. It is very clear to us that this property does not come within the constitutional description, and we have found no intimation that the statutes meant to include it.

Whether plaintiff's business itself can be taxed is not involved here. This is not a tax on business directly, although it is evidently measured by business, which is not the legal test.

We think the tax was invalid, and judgment must be rendered for the plaintiff for the amount paid, with interest, and costs of both courts, reversing the judgment below.

TAXATION. — Unpublished manuscripts are not subject to execution or taxation: *Dart v. Woodhouse*, 40 Mich. 399; 29 Am. Rep. 545.

MARSHALL v. WIDDICOMB FURNITURE COMPANY.

[97 MICHIGAN, 187.]

MASTER AND SERVANT — INJURY FROM DEFECTIVE APPLIANCE — NEGLIGENCE QUESTION FOR JURY. — In an action to recover damages for an injury from a knife flying out of a shaper-head, if the proof shows that it was the first time the shaper was used; that the injury happened as soon as it reached its highest velocity, before it was applied to cutting timber; that such shaper-head was contrived, invented, and made upon a plan of one of the principal managers of the employer; that it was novel, and differed in some respects from other heads in use, and especially in the device used to check the tendency of the knife to fly out of its socket, — this evidence, together with the fact that the knife did fly out when fastened as well as it was designed to be, has a tendency to prove that the design was bad, and is at least enough to go to the jury on the question whether it was a reasonably safe implement, and properly designed, and whether the principle it involved was not a departure from safe methods as before applied; and the fact that there may have been some conflict on one or another question does not authorize the trial judge to deprive the jury of power to determine such conflict.

MASTER AND SERVANT — DANGEROUS MACHINERY. — Persons using machinery are not held to any absolute duty of insuring its safety, but some care is required in introducing untried novelties. That which has been approved as safe by reasonable experience may be presumed safe by those who rely on that experience to justify them in selecting it; and where the result of any defect must be an immediate danger to human life, it devolves on those who expose life to the dangers of a new experiment which turns out badly to show that they have followed such a course as the understood rules of service or mechanics applicable to such matters rendered safe according to ordinary probabilities.

Everett D. Comstock and Benjamin F. Sliter, for the appellant.

Butterfield and Keeney, and Edwin F. Uhl, for the defendant.

CAMPBELL, C. J. Peter Marshall was killed by a knife flying out of a rapidly revolving shaper-head the first time it was used as then arranged, and as soon as it reached its high velocity, before it was applied to cutting into lumber to be worked. The testimony was strong that the knives had been fastened in as tightly as they could be. The head was got up on a new plan, by the contrivance and invention of one of the principal managers of defendant, and was made accurately from the plan. The court below, without giving reasons for that conclusion, held there was no proof of negligence, and ordered a verdict for defendant. This ruling would have made all other points immaterial. There were several rulings excluding evidence which seems to have had some legal bearing on the points in controversy. The only conceivable grounds

for taking the case away from the jury must have been that the defendant had, in choosing to have the shaper-head made as it was, been legally justified in taking that responsibility, having a right to rely on the skill of those who acted in making or selecting it.

The testimony tended to show that the construction was novel in some respects. There was testimony tending to show that one of the differences between the shaper-head in question and others used before it was, that in this the projecting knives, which were set in the solid body of the head, were set in parallel grooves, and were made with parallel surfaces, so that they were only held in place by the pressure of metal on metal, without shoulders, wedges, or any other device to hold them beyond friction; while in others there were such devices, by making the shank of the knife wedge-shaped, and thicker at the inner end than at the outer, or by some other device, whereby the knife would be checked in its tendency to fly out of its socket.

The fact that a knife did fly out when fastened in as well as it was designed to be, and when the testimony indicated no imperfection in carrying out the design, had at least a tendency to prove that the design was bad. Never having been used again, there was nothing to indicate that it would have been any safer, or to overcome the proof that it had been made as safe as its nature permitted. There was at least enough to go to the jury on the question whether it was a reasonably safe implement, and properly designed, and whether the principle involved in it was not a departure from safe methods as before applied. If there was such testimony, the fact that there may have been some conflict on one or another question would not allow the judge to deprive the jury of the power to determine the conflict.

The law does not hold persons using machinery to any absolute duty of insuring its safety. It does, however, require some care in introducing untried novelties. That which has been approved as safe by reasonable experience may be presumed safe by those who rely on that experience to justify them in selecting it. But where the result of any defect must be an immediate danger to human life, it devolves on those who expose human life to the dangers of a new experiment which turns out badly to show that they have followed such a course as the understood rules of science or mechanics applicable to such matters rendered safe according to ordi-

nary probabilities. This machine was, according to some, at least, of the testimony, made in violation of known rules of mechanics, in trusting to mere pressure to overcome the centrifugal tendencies of a knife revolving at great velocity. It was devised by defendant on its own responsibility. Whatever view the jury might have taken of the matter, the questions presented were distinct questions of fact, and ought to have been submitted.

It certainly cannot be said, as matter of law, that the deceased contributed to the casualty by his negligence. He was not a trespasser, and the knife was just as likely to be thrown in one direction as another. No one could have supposed that where he stood was particularly dangerous.

As the argument naturally rested chiefly on the withdrawal of the case from the jury, the questions concerning the rejection of testimony were not as fully presented as they otherwise would have been. There is reason to urge that testimony was shut out concerning mechanical questions, and some others which might have thrown light on scientific subjects. It is not very clear that average jurors, or average persons not jurors, do not need some instruction on mechanical rules and scientific facts, which require some intimacy with practical affairs. Theoretical knowledge is not always practical knowledge, and many intelligent persons are deficient in the power of readily comprehending such matters. In the present case, there was more or less conflict on some of the questions which the court seemed to regard as within the common knowledge of mankind.

The judgment should be reversed, and a new trial granted.

SHERWOOD, J., dissented, and stated that among the machines used by defendant in the manufacture of furniture was the one known as a shaper-head, used in raising moldings or panels, in cutting grooves, rounding edges, and in doing other work. This machine was made by putting on a perpendicular spindle extending up through a table two circular iron collars, one above the other, the inner surfaces perfectly smooth, with grooves cut therein in which the knives were placed to be used by the machine in doing the different kinds of work. The pressure of a nut upon the collars was depended upon to keep the knives in place and from flying out. It is conceded that when in motion a shaper-head is a very dangerous machine, and that when properly used it is usual that knives are expelled therefrom. The change made in the machine in question by the secretary of the defendant company was intended to make it more safe. It was made, put together, and tested to the entire satisfaction of skilled machinists before it was put in use. That as the shaper-head was not complicated, and the principles involved therein were easily understood by ordinary machinists, the defendant company was warranted in puttin-

it into use, especially when the evidence did not dispute the fact that the change made in the old machine was nothing new, and well calculated to serve the purpose for which it was intended, the only dispute being as to the manner of its application, and that in this the defendant company obtained skilled and competent mechanics and machinists; that "the duty which the defendant owed to young Marshall was that of a master towards a servant in his employment; that duty was to take ordinary and reasonable care not to subject him to unreasonable and extraordinary dangers. The defendant, however, when it took the boy in its employ did not guarantee his safety. Safety in the use of machinery is only comparatively so, both as to those using it and to those at work in its immediate vicinity. All machinery is dangerous when in use, to a greater or less extent; and when it is said that the master may become liable for negligence in not providing suitable and safe machinery, it is not meant that the master warrants the strength or safety of his machinery or appliances, but that he is personally negligent in not taking proper precautions to see that they are reasonably strong and safe. The law does not require him to guarantee the prudence, skill, or fidelity of those from whom he obtains his tools or machinery, or the strength or fitness of the materials they make use of. If he employs such reasonable care and prudence in selecting or ordering what he requires in his business as every prudent man is expected to employ in providing himself with the conveniences of his occupation, this is all that can be required of him, and he is only responsible where he has failed to use such care in securing the making of such machinery by competent and skilled workmen, or in the selection thereof"; citing *Cooley on Torts*, 557; *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Readhead v. Railroad Co.*, L. R. 2 Q. B. 412; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; 20 Am. Rep. 331; *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 554; *Toledo etc. R'y Co. v. Fredericks*, 71 Ill. 294; *Mobile etc. R. R. Co. v. Thomas*, 42 Ala. 672; *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 389; 18 Am. Rep. 412; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; 2 Am. Rep. 497; *Finks v. Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Shanny v. Androscoggin Mills*, 66 Me. 420. His honor then states that the record shows that Marshall was fifteen years of age at the time of his death; that he was a bright and intelligent boy, who had been employed in a manufactory and drug-store before entering the employment of the defendant; that he was fully cognizant of his position, surrounded by dangerous machinery, and under his contract of service assumed the ordinary perils and risks attached to the business, and those arising from the negligence of fellow-servants; that he had been employed for such length of time as must necessarily familiarize him with the dangers of the business; that the place he occupied at the time of the accident was one of his own choice, and not a place occupied by direction of a foreman in the employ of defendant, though such place was outside the business for which he was employed; that defendant undoubtedly had a right to make such changes in machinery as was desirable, provided no law was violated; that the change made in the shaper-head in question was for the purpose of making the machine more safe, and to keep the knives from flying out, and that though there was some conflict in the evidence as to how the change should have been made, still competent and skillful machinists were employed to make the change; that defendant was privileged to choose from among his competent workmen those who should make the change, and he was not required to use the best nor the safest machine, nor responsible for failure to discard one which was unsafe, and supply in its place something safer; citing, in support of this doctrine, 2 Thompson on Negligence, 963; *Fort*

Wayne etc. R. R. Co. v. Gilderleeve, 33 Mich. 133; *Stack v. Patterson*, 6 Phila. 225; *Western etc. R. R. Co. v. Bishop*, 50 Ga. 465; *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143; *Jones v. Granite Mills*, 126 Mass. 84; 30 Am. Rep. 661; *Piper v. New York etc. R. R. Co.*, 1 Thomp. & C. 290; *Salter v. President etc. of the Delaware etc. Canal Co.*, 3 Hun, 338. No negligence could be attributed to defendant in furnishing the machine in question, for the reason that the changed shaper-head was made by skilled workmen of experience, and after its completion was put into operation and worked to the entire satisfaction of the foreman of the floor and others who saw it. As to the question of the claimed incompetency, on account of his youth, of the party who adjusted and tightened the knives in the machine the morning of the accident, the judge says: "He was at that time eighteen years of age, and had worked in the defendant's shops then about nine years, and was working on the same floor with the deceased when he was killed. He had had two years and a half previous experience in making knives and taking care of machinery. He did not make the knives one of which killed the young man. He set the knives and screwed up the fastenings, and says the knives fitted right, and were fastened in tight. But it was claimed his age and inexperience should have been submitted to the jury as tending to show his incompetency. It is, however, nowhere shown that what he did was not right." His honor then states, in effect, that but little importance would be attached to this question, as the shaper-head was carefully examined by the foreman in the presence of its maker and another workman who was running a shaper-head, after the young machinist who set and tightened the knives had left the machine, and the competency and skill of none of these men were doubted or questioned. The record also shows that four or five skilled mechanics, with an experience of from five to thirty years each say that the changed shaper-head was a safe machine, and correctly constructed in principle. "A careful review of the entire record in this case since the argument has satisfied me that the defendant's machine was a safe one of that class; that it was made and operated by competent and skillful persons in the defendant's employ, and that there is no testimony tending to show to the contrary; that young Marshall lost his life without any fault or negligence on the part of the defendant; that the accident which overtook him, and resulted fatally, must be regarded as being included among the hazards assumed when he entered the employment of the defendant, and for which no recompense can be legally enforced. The judgment of the superior court of Grand Rapids should be affirmed."

NEGLECTANCE IS ORDINARILY A QUESTION OF FACT, under the circumstances surrounding the alleged want of care, which the jury alone should determine: *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; *ante*, p. 87, and note 89; *Village of J. v. Chapman*, 127 Ill. 438; *ante*, p. 136, and note 142; *Johnson v. Missouri etc. R'y Co.*, 96 Mo. 340.

MASTER AND SERVANT. — DEFECTIVE MACHINERY AND APPLIANCES: See cases discussed and cited in the dissenting opinion of the principal case by Sherwood, J.

PEOPLE v. PARKER.

[67 MICHIGAN, 222.]

FORGERY — EVIDENCE. — On a trial on information for forgery of a deed, the testimony of a register of deeds that a careful examination of his records failed to show any transfer of particular land by a grantee in a deed introduced in evidence, save by the alleged forged deed, is admissible to show title to the land in such grantee at the time of the alleged forgery.

FORGERY — EVIDENCE. — On trial of an indictment for forging the name of a deceased person to a deed, the files of the probate court of the estate, including the will of such deceased person, are inadmissible as evidence for the purpose of allowing comparison between the signature to the will and that to the deed.

FORGERY — EVIDENCE. — On the trial of an information for the forgery of a deed, the evidence of witnesses testifying to the genuineness of the signature to such deed by comparison with a genuine signature affixed to a document not legally in evidence for some other purpose than that of comparison is inadmissible.

CONSPIRACY — EVIDENCE. — The theory that the acts and declarations of each conspirator in pursuance of the common purpose may be given in evidence against all only applies when such acts and declarations are confined to the time intervening between the beginning and ending of the conspiracy, and said or done in the presence of the other conspirators with their knowledge and ratification. Before such acts or declarations can be admitted in any event, a *prima facie* case of conspiracy must appear to the trial court, so that they may be submitted to the jury to be used if they find that a conspiracy existed, but discarded if it is not established.

FORGERY — EVIDENCE. — Where one indicted for forgery of a deed testifies in his own behalf that the alleged forged deed is genuine, — that it was part of a double blank executed and detached on the same day that the grantor executed the other deed admitted to be genuine, and so given in evidence, — two witnesses testifying that upon a careful comparison of the deeds they matched exactly at the top, where they had been torn apart, the deed admitted to be genuine to be admitted in evidence, and the defense allowed to prove that it was genuine, and so treated by the grantor in her lifetime, and used upon a public trial before her death, and upon the production of such proof, comparison between the two signatures would be proper.

FORGERY — EVIDENCE. — On a trial of an information for forgery, a recognition to appear and answer, and an affidavit for a continuance, are part of the record in the case, and may be used in making a comparison of handwriting.

FORGERY — EVIDENCE. — On the trial of an indictment for forgery, a note and mortgage bearing the signature of the alleged forger, but not a part of the record in the case, or admitted in evidence for other purposes, are not admissible for the sole purpose of making a comparison of signatures.

FORGERY — EVIDENCE. — The condition, whether drunk or sober, of an alleged forger when he made any signature or writing properly in the case, is admissible when such writing is used for a comparison of handwriting.

CONVICTION of forgery of a deed. Defendant, Parker, was charged jointly with C. Van Alstine and E. C. Cleveland with conspiracy to forge the name of Eleanor Van Alstine to a deed conveying her title to forty acres of land to C. Van Alstine; said deed purports to be executed by Eleanor Van Alstine in the presence of said Cleveland and defendant, and acknowledged before the latter as notary public. It is dated May 9, 1876, when the legal title was in the purported grantor, under the name of Eleanor Pelton, who are admitted to be one and the same person. Eleanor Pelton had resided with C. Van Alstine as his wife, and had been recognized by him as such, though no legal marriage existed between them. She at one time joined with him as his wife in the execution of a deed, under the name of Eleanor Van Alstine. She died in August, 1876, leaving the land in dispute and some personal property. Her heirs were sisters, named Mrs. Giddings and Mrs. Westcott. A will of Eleanor Pelton was found and probated, at which time the record title of the land was in her. On April 16, 1877, C. Van Alstine had the alleged forged deed recorded, such deed being dated May 9, 1876, and naming Eleanor Van Alstine as grantor and C. Van Alstine as grantee.

C. E. Weaver, for the respondent.

Moses Taggart, attorney-general, for the people.

MORSE, J. The respondent, Parker, was convicted in the circuit court for the county of Hillsdale upon an information charging him, jointly with Van Alstine and Cleveland, with the crime of forging and uttering a deed to forty acres of land in said county.

Van Alstine had been previously found guilty, and the affirmance of the verdict in his case by this court will be found in the case of *People v. Van Alstine*, 57 Mich. 69.

The particulars of the forgery are set forth in the opinion in Van Alstine's case.

A large number of errors are assigned, but we shall only notice such as shall appear to us to be of importance.

The information contains ten counts. In Van Alstine's case, this court passed upon the validity of these counts, and held all of them good save the seventh and eighth. There is no good reason in the present case for any different ruling.

Evidence was introduced by the people of the record of a deed executed in 1869 by one Walters to Eleanor Pelton, and

the register of deeds was permitted to testify that a careful examination of the records failed to show any transfer of the land by Eleanor Pelton, or Eleanor Van Alstine, since that time, save the alleged forged instrument. This was done with the avowed purpose of showing title to the land in Eleanor at the time of the alleged forgery. The evidence was proper.

The probate court files in the estate of Eleanor Pelton, deceased, were offered in evidence by the people, and admitted, against the objection of respondent's counsel. The papers thus admitted included the will, and all the proceedings leading to its probate and allowance, executor's bond, and letters testamentary, appraisers' warrant and inventory, notices of commissioners' meetings to audit claims, final account of executor, order allowing same, order of distribution, and discharge of executor.

None of these papers or proceedings were at all material or relevant to the question at issue, and could possibly throw no light upon the case. Yet witnesses were permitted to examine the signature of Eleanor to the will, and compare the same with the signature to the alleged forged deed, and give testimony from such examination and comparison tending to prove the latter signature a forgery.

This was error. Comparisons of this kind can only be made with such writings as are legally in evidence for some other purpose than that of being compared. I can see, from the record, no reason why the will should have been admitted except for the very purpose for which it was used on the trial, namely, to show that the signature to the deed was a forgery. No other reason was assigned upon the trial, nor upon the argument in this court.

It is evident that the probate files were introduced for the express purpose of putting the will in evidence, that it might be used as it was used. This cannot be permitted: *Merritt v. Campbell*, 79 N. Y. 625; *Miles v. Loomis*, 75 Id. 291; 31 Am. Rep. 470; *Hynes v. McDermott*, 82 N. Y. 51, 52; 37 Am. Rep. 538; *United States v. Jones*, 10 Fed. Rep. 469; *Randolph v. Loughlin*, 48 N. Y. 456; see also *Vinton v. Peck*, 14 Mich. 287, 293, 294; *Van Sickle v. People*, 29 Id. 61, 64.

A very important question arising in this case relates to the admission of the statements of Van Alstine, made at various times, in reference to this deed and the ownership of the land, not in the presence or hearing of the respondent, Parker, and without his knowledge or consent.

The theory of the prosecution was, that Van Alstine, Cleveland, and Parker conspired together to commit this crime, and that the acts and declarations of each in pursuance of the common purpose were evidence against all, whether in their presence or not.

This is true where the acts and declarations sought to be given in evidence are confined to the time intervening between the beginning and ending of the conspiracy. What was said or done by one of the conspirators before the conspiracy was formed, or after its object has been obtained, or its work fully completed, not in the presence or hearing of the others, and not brought to their knowledge, and ratified by them, is not admissible against them, or either of them.

And before such acts and declarations can be admitted in any event, a *prima facie* case of conspiracy must appear to the trial court, and then the declarations and acts during the performance of the conspiracy can be submitted to the jury, to be used by them if they find such conspiracy existed, but to be discarded in case it is not established. Such acts and declarations cannot be used to show the conspiracy without other independent evidence.

The first statement made by Van Alstine in reference to this land after the death of his wife, as proven by the people, was to one Thomas J. Lowery, at a religious meeting held near Kelley's Corners. The substance was, that he had given Eleanor some hundreds of dollars towards the payment for this land; that he would have had her deed it to him had he supposed she was going to die; but as it was, he had not "the scratch of a pen to show for it." He asked Lowery what he could do about it, and Lowery advised him to place his claim before the commissioners. Respondent then said: "Tom, can you make out a deed, and date it back?" Lowery answered: "No, sir; I cannot." There is no pretense that the respondent ever knew of this conversation; and there is not the slightest warrant anywhere in the testimony that at this time any conspiracy had been formed or thought of between Parker and Van Alstine. On the contrary, the fact of Van Alstine asking Lowery to make a false deed rebuts any idea that he and Parker had agreed together to forge the deed in question. The evidence had a direct tendency to show that at the time of the talk with Lowery no deed from Eleanor to Van Alstine was in existence, and therefore that the deed acknowledged by Parker was a forgery. It was properly used against Van

Alstine upon his trial; but as against Parker it was inadmissible, being the declaration of Van Alstine without the presence or sanction of Parker, and before they had joined in a conspiracy to forge and defraud, as alleged in the information.

Equally inadmissible was the testimony of Hiller to a conversation had with Van Alstine to the same purport. In May, 1877, Hiller testifies that Parker had a conversation with him nearly of the same nature as that of Van Alstine, which occurred in December, 1876, or January, 1877. It is argued that the similarity of these two talks is evidence of a then existing conspiracy between Van Alstine and Parker to forge a deed of this land. What Parker said was clearly admissible against him, and might be evidence of a conspiracy formed at that time; but it had no tendency to establish a conspiracy existing at the time of Van Alstine's talk with Hiller.

Evidence was also introduced as to what was done and said in the presence of Van Alstine at the time of the appraisal of the property of the deceased, Eleanor Pelton; and that when the appraisers spoke of inventorying this land as the property of Eleanor, Van Alstine made no objection. It is not shown that Parker was in any way connected with this appraisal, or knew anything about it. The appraisal took place in the fall of 1876. It is evident that no conspiracy existed at that time. The evidence was improperly received.

What Van Alstine said to Mercer about having a deed, and the taking of the same out of his pocket and showing it to him, was admissible. There was sufficient evidence tending to show that the deed was a forged one, and if so, the acknowledgment by Parker was a false one. The object and purpose of the conspiracy was not there ended. It was proper for the jury, if they found a joint combination to defraud then existing between Parker and Van Alstine, to use this testimony against the respondent. The same principle governs the testimony of the witness Pease, as far as his evidence relates to the showing of the deed by Van Alstine, and what the latter said at that time.

The respondent, being examined as a witness in his own behalf, testified that the deed alleged to be forged was a genuine one, and was executed by Eleanor Pelton upon the same day that she and Van Alstine executed and delivered another deed to Edward Cleveland. This latter deed was admitted in evidence in the court for the purpose, as stated at the trial, of

allowing the jury to draw such inferences or conclusions as they might think proper as to the time when the alleged forged deed was made.

The theory of the defense was, that both these deeds bore the genuine signature of Eleanor, and were executed by her the same day, and were both originally parts of a double blank, and detached on the day of their execution. Two witnesses testified that they had carefully compared the two deeds, and that they matched completely at the top, where they had been torn apart.

It was said in the opinion of Mr. Justice Champlin in the Van Alstine case that it would not have been error to have excluded all evidence in relation to the Cleveland deed. But in view of the evidence of the respondent in the present case, and the theory of the defense above indicated, it seems to me that it was proper and legitimate to introduce the Cleveland deed in evidence, and to prove that it was a part of the blank to which the deed in question here belonged. The defense also should have been permitted to show that the Cleveland deed was a genuine one, and so treated and regarded by Eleanor Pelton in her lifetime, and that it was seen in existence and used upon a public trial before her death; and this being allowed, a comparison between the two signatures would have been proper. There was, therefore, error in not permitting this proof to be made. If it were a fact that these two deeds were part of the same double blank, the respondent was entitled to the full weight and bearing of the probabilities arising from such fact. And if the Cleveland deed was a genuine one, and so recognized by Eleanor Pelton, such fact would have a very pertinent bearing upon the point in issue, to wit, the genuineness of the alleged forged deed.

I think it was not error to allow the bonds of the respondents recognizing for their appearance at the circuit to answer the information filed in this cause, and the affidavit of Cleveland for a continuance of the case, to be admitted in evidence, and to be used in making comparisons of the handwriting of Van Alstine and Cleveland. They were part of the files in the cause, and as such belonged to the case, to be used for any material and relevant purpose therein.

Upon the cross-examination of William Mercer, a witness for the people, the counsel for the defendant showed him a note and mortgage, known in the record as the Olds note and mortgage, and asked him to look at them. He then tes-

tified, in answer to questions by the same counsel, that he saw Eleanor Pelton sign these papers, and that he knew her signature to them to be genuine. He was then asked to compare them with the signature to the alleged forged deed, and give his conclusions therefrom. The court did not permit the question to be answered, but said that he would withhold his ruling for the present. Afterwards the matter was renewed upon the examination of a witness for the respondent. The prosecuting attorney, being asked if he disputed the genuineness of the signatures to the Olds note and mortgage, stated that he did. Thereupon the court ruled that the comparison could not be made. This ruling was correct, under the authorities heretofore cited. These papers were not in the case, and there was no purpose for which they could be admitted except for the sake of comparison.

I think it was legitimate to show the condition of Van Alstine, whether drunk or sober, when he made any signature or writing properly in the case.

The Maples deed was rightfully excluded. It was not executed the same day as the Cleveland deed, and had no connection with the alleged forged deed: See *People v. Van Alstine*, 57 Mich. 69, 80.

Upon a careful examination of the charge of the court, I find no errors therein, except in the instructions that the jury might use the evidence of the statements of Van Alstine, which I have heretofore stated were erroneously admitted in evidence. Such requests of the defendant's counsel as were applicable and good law were given in substance, and clearly enough stated to preclude any possible mistake as to their meaning. The qualifications added to others were such as the law authorizes. The charge was fair and plain, and the law correctly stated, except as above noted.

For the errors arising upon the trial, the verdict must be set aside and a new trial granted.

CONSPIRACY. — EVIDENCE IN CASES OF: See *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note.

FORGERY — HANDWRITING. — Papers, not otherwise relevant, if proved to be genuine, may be received in evidence for the purpose of comparison: *Morrison v. Porter*, 35 Minn. 425; 59 Am. Rep. 331; *Benedict v. Flannagan*, 18 B. C. 506; 44 Am. Rep. 583; *contra*, *Bruce v. Oresce*, 39 Ga. 544; 99 Am. Dec. 457.

ARMSTRONG v. MEDBURY.

[97 MICHIGAN, 250.]

NEGLIGENCE—DEFECTIVE PREMISES—INJURY TO LICENSEE.—A person lawfully driving upon the premises of another is bound to leave them by the usual, ordinary, and customary way in which such premises are and have been departed from, provided the same are safe, free from defects, and in good condition; and if, for his own convenience, or some other reason, he departs from such way, and takes another, he becomes, at best, a mere licensee, and cannot recover for injuries from a defect in the latter way, unless it was substantially adjacent to the former way, and a distance of twenty-five feet is not so adjacent.

NEGLIGENCE—CONDITION OF PREMISES—DUTY OF OWNER—LICENSEE.—A manufacturer cannot reasonably suppose that his premises will be used, as to ingress and egress, in any other manner than the usual, ordinary, and customary way, well defined from constant use; nor must he render his premises safe, by fencing or otherwise, for any purpose for which he cannot reasonably anticipate they will be used.

MANUFACTURER—DUTY AS TO PREMISES.—A manufacturer must be allowed to use his premises for his business purposes in such manner as he may choose, so long as they are not rendered dangerous to the ordinary use of the public doing business with him, or dangerous to his employees.

Charles B. Lothrop, for the appellant.

Thomas J. Davis and Theodore Hollister, for the plaintiff.

SHERWOOD, J. The defendant in this case is the owner of the Pontiac Gas-works, fronting Wesson Street.

The buildings of the works consist of a retort, purifying-house, and a holder, and all stand facing the street, and nineteen feet from the line thereof. They are forty-two feet from the graveled or traveled portion of the street. There is no fence between it and the buildings. The other sides of the premises, except where they lie next to the railroad, are fenced. The ground is level about the buildings. The center of the street and the railroad track are, however, on a grade about three feet higher.

The holder is on the extreme west side of the premises. Eight and one half feet east of it is the purifying-house, and twenty-five feet east of that is the retort. The street is on the north side of the buildings; and directly south, and a few feet from the retort and purifying-house, stands the coke-shed, which is reached by two well-defined, traveled tracks, extending from the street to the shed, passing over the vacant space in front of the buildings, and between the retort and purifying-house.

When coke was taken from the shed, the wagons were sometimes backed in between the two buildings, and at others were driven in on one track, and when the load was obtained, passed out on the other; both tracks being well defined, and well known to those who did business with the gas-works.

On the second day of April, 1885, the plaintiff, who drove a one-horse express-wagon, and was entirely familiar with the grounds, went to the shed with his horse and wagon, and got a load of coke. In returning, he passed out on one of the tracks mentioned, into the highway, where his horse became very restless at an approaching train of cars, and finally refused to go farther.

The two tracks upon which the coke-shed was reached were about fifty-eight feet apart at the highway, and the plaintiff attempted to return, and go out on the other track. In so doing he lost control of his horse, which ran up near the northwest corner of the purifying-house, and there went down into the ground at a place made soft and spongy by the escape of steam from a broken pipe in the ground, and before the animal could be extricated it was so injured as to become worthless. The horse was valued at one hundred dollars.

For the value of the animal thus injured the plaintiff brings suit, and alleges, as the ground of his action, that the defendant was negligent in not knowing of this dangerous place, if she did not know, and properly protecting persons going upon her premises, and their horses from injury, by a fence, or by giving them some proper warning of the danger.

The cause was tried at the Oakland circuit, before Judge Stickney and a jury, and under the rulings and charge of the court the plaintiff had judgment for the value of the horse.

The testimony of both parties showed that the place where the accident occurred was at least twenty-five feet from any track upon the grounds used for passing in and out by men and teams, and that it was used for other and different purposes (it was used by the defendant in preparing material for the manufacture of gas), and that a team had never before been known to go upon the ground at the place where the injury to plaintiff's horse occurred.

The testimony of the defendant also tended to show that the break in the pipe at that place was unknown to the superintendent at the works, or to any of the other employees of the defendant, at the time the injury occurred.

The plaintiff's testimony of knowledge on the part of the

defendant was to the effect that other persons had seen steam, on several different occasions previous to the accident, issuing from the ground at different places along the line of the pipe that was broken, and one witness testified that he once saw it issuing from the place where the horse was injured; and it was claimed that the superintendent should have seen it. Whatever may be thought of the competency of the testimony for the purpose offered, of seeing steam issue from the place where the horse was injured, certainly the testimony of that observed at other places from that where the injury occurred, and at different times, was incompetent and irrelevant, and was erroneously received.

It appears, from the undisputed testimony, that the plaintiff had taken on his load of coke, and left the premises of the defendant, and when he brought his horse back upon them it was not for any business that he had with the defendant, but for the purpose of taking another way, to avoid the cars, at which his horse took fright. The defendant could not be expected to provide against injury to the plaintiff's horse in its frenzied perambulations upon her premises outside of the usual and ordinary avenues provided for the public having business on defendant's premises at the gas-works. And in this connection the defendant's third request, which was as follows, should have been given: "The plaintiff was bound to leave defendant's premises by the usual, ordinary, and customary way in which the premises are and have been departed from, provided the same be safe and in good condition; and if, for his own convenience, or other reason (than defect in the usual place of departure), he leaves such way, he becomes at best a licensee, and cannot recover for injuries from a defect outside of said way, unless it was substantially adjacent to such way, and in this case the defect was not so adjacent."

There is no question upon the record but that the tracks of defendant upon her premises were in good condition, and safe, and the alleged place of danger cannot be said to be so near the track as to be dangerous. It was at least twenty-five feet from the track. The cases cited by counsel for defendant upon this point fully sustain his position. See also *Early v. Railway Co.*, 66 Mich. 349.

The failure to give this request was error.

The following three requests should also have been given, but were refused, viz.: —

"1. The undisputed evidence shows that there were two

well-defined roadways or paths leading from the place where plaintiff rightfully was, viz., where the coke was delivered, to the road, which were safe, free from defects or obstructions, and which were always used by persons coming to or going from defendant's premises.

"2. In this case, defendant could not reasonably suppose that her premises would be used, as to ingress and egress, in any other manner than the usual, ordinary, and customary way, viz., over the ways that were well defined, from constant usage, for such ingress and egress.

"3. The defendant was under no obligation to render her premises safe for any purpose for which she could not reasonably anticipate the same to be used."

Under the circumstances of this case, these requests were proper and necessary to be given, in order to secure justice between these parties before the jury, and we find them nowhere given in the charge of the court.

It is unnecessary to consider the case further. Perhaps we ought to say, however, that it was not necessary for the defendant to fence her premises to prevent such accidents as this.

Persons engaged in a manufacturing business must be allowed to use their premises for that purpose in such manner as they may choose, so long as that management is not dangerous to the ordinary use by the public having business with the manufacturer, or to the employees.

For the errors herein noted the judgment must be reversed, and a new trial granted.

NEGLIGENCE. — The owner of premises is not liable in damages for an injury sustained by another while lawfully thereon, in absence of any evidence to show the direct cause of the injury, or that it was the result of the owner's negligence: *Huey v. Gahlenbeck*, 121 Pa. St. 238; 6 Am. St. Rep. 790, and note. Damages are not recoverable by a trespasser or mere licensee who is injured by any dangerous machine or contrivance on the land or premises of another, unless the contrivance is such as the owner may not lawfully erect or use, or when the injury in inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises: *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611, and note 615; compare *Nicholls v. Washington etc. R. R. Co.*, 83 Va. 99; 5 Am. St. Rep. 257, and note 261; *Donaldson v. Wilson*, 60 Mich. 86; 1 Am. St. Rep. 435, and note; *Schwartz v. Gilmore*, 45 Ill. 454; 92 Am. Dec. 227; *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644.

JONES v. PASHBY.

i

[67 MICHIGAN, 459.]

BOUNDARIES — PAROL AGREEMENT — BURDEN OF PROOF. — Where tenants in common by exchange of deeds divide their land, but leave the description of the boundary line confused and ambiguous, and the grantee of one of the tenants, as plaintiff in ejectment, claims up to boundaries fixed by a construction of the deeds by the court, while the defendant, the grantee of the other tenant, claims up to a different boundary line as fixed by a parol agreement between the tenants, the burden of proof is on defendant to show the existence of such agreement, and that the boundary fixed by it had been accepted and acquiesced in by the tenants. This may be shown by the acts of the tenants while they were the owners of the land, by showing improvements made thereon by defendant's grantor, and statements by plaintiff's grantor made subsequent to such agreement, while he was owner, against his title.

BOUNDARY — ACQUIESCENCE — LIMITATIONS. — Where parties, by mutual agreement and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established between them, such line will be considered the true line between them, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession.

BOUNDARY — PAROL AGREEMENT — ESTOPPEL. — Where the boundary line fixed by tenants in common by exchange of deeds is so confused and ambiguous as to require the construction of a court, they may meet, and by parol agreement fix the boundary, and such agreement, if acquiesced in for years, will operate as an estoppel, the enforcement of which will not be prevented by the statute of frauds.

EJECTMENT. James and Charles Richardson, tenants in common, on May 20, 1872, executed and exchanged deeds to the land in dispute for the purpose of dividing it between them. On October 5, 1872, James Richardson deeded his portion of the land to R. Mandigo. Mandigo and wife, on January 30, 1875, by mortgage deed conveyed said land to R. Pashby, but prior thereto said Mandigo had erected a building on the land, and made other improvements. On March, 1876, Pashby went into possession of all of the premises in dispute, which possession he has retained ever since, and on March 19, 1877, he filed his bill to have the deed declared a mortgage, and the same foreclosed; this the court ordered done, and a sale of the premises to satisfy the same, and the premises were sold to Pashby, who received a commissioner's deed June 29, 1878. The plaintiffs, John H. Jones and others, claim title through Charles Richardson and wife by deed dated May 7, 1878. Other facts appear in the opinion.

H. H. Riley and J. B. Shipman, for the appellants.

D. C. Page, and Keighley and Knowlen, for the defendants.

MORSE, J. This is the third time this case has appeared in this court: See *Jones v. Pashby*, 48 Mich. 634, and 62 Id. 614.

A sufficient statement of the matters in controversy will be found in the opinions filed heretofore.

When the case was last here we held that the language of the deeds exchanged between Charles and James Richardson intended a division of the one hundred acres by quantity, each taking fifty acres. But we further said: "There was evidence introduced upon both sides, upon the trial of the case in the court below, tending to show an actual location of the boundary line between James and Charles Richardson, and also between Charles and the grantees of James. This testimony should have been submitted to the jury, and if they found therefrom that the line agreed upon was located west of the premises described in the declaration, the defendants should have judgment. If any other line had been agreed upon between the owners as the boundary line, it would govern the case. But if no agreement or practical construction had been put upon the deed, in applying it to the subject-matter, by the owners, then the division line which would divide the whole tract so as to give each one half in quantity is the line which must control the rights of the parties to this case."

The case went back to the circuit under this ruling of ours; and upon a trial there had, the testimony showing this agreement was admitted, and the jury found the boundary line to have been fixed by agreement, as claimed by the defendants. Judgment passed in their favor.

The plaintiffs bring error, and claim that there was no legal evidence tending to show an agreement, and even if there was any such testimony, it cannot avail defendants, because only about eight years had elapsed between the making of such agreement and the commencement of this suit.

It appears almost conclusively from the record that the agreement was made to fix the boundary line, and that it was acquiesced in and treated as such boundary during the life of James, and while he and Charles owned the respective portions of the one hundred acres, and afterwards.

The defendants' grantor built a hotel upon the premises now in dispute, and made other improvements upon it.

The defendants and their grantors have held and occupied

the ground in dispute ever since the division of the one hundred acres. At any rate, the jury were warranted in finding as they did.

The declarations of Charles Richardson were admissible against the title of his grantees, the plaintiffs.

The court instructed the jury that the burden of proving the boundary line to have been established between Charles and James Richardson, and located as they claimed, devolved upon the defendants, and that they must do this by a fair preponderance of evidence before they could recover; also that before they could find a different line than the one established by the deeds, as interpreted by the supreme court, they must find from the evidence that they were agreed as to such other line as between them, and applied the deeds to such line, and assumed and acted upon the assumption that the other line (as claimed by defendants) was the boundary line, and treated it as such; and that the center line was the only one claimed by them, and was the one recognized and treated as the boundary line.

"The landmarks which were agreed upon at the time, and recognized since, as fixing the dividing line by the brothers in making the division, must govern, regardless of where the words of the deeds would draw the line. If you find that the defendants have shown by a fair preponderance of evidence that there was such a line fixed and recognized as the dividing line, it must govern."

This instruction was good law, and fairly stated.

It is not necessary to here decide how long such an agreement would have to be acted upon and acquiesced in to bind the parties. It is sufficient to say that, under the charge of the court as given, the jury must have found an acquiescence by all the parties in this boundary line up to the purchase of Charles Richardson's title by the plaintiffs, and such time was long enough to settle such boundary line beyond controversy.

It has been frequently held in this state that where parties by mutual agreement, and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established between them, such line will be considered the true line between them, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession: *Smith v. Hamilton*, 20 Mich. 433; 4 Am. Rep. 398; *Joyce v. Williams*,

26 Mich. 332; *Stewart v. Carleton*, 31 Id. 270; *Dupont v. Starving*, 42 Id. 492.

In this case the deeds were so ambiguous as to require their meaning to be settled in this court as to where the division line would run between the parcels conveyed and divided thereby. It was therefore a case where Charles and James might well be in doubt as to where the line was located by such deeds, and therefore, in order to settle such doubt, they were authorized to meet and agree where a boundary line should be under said deeds. And a parol agreement under such circumstances would act as an estoppel, if acquiesced in for years, and the statute of frauds would not intervene to prevent the enforcement of such estoppel: *Cronin v. Gore*, 38 Mich. 384.

And in my opinion, it would not take the number of years shown in this case, where, as here, the parties contesting such agreement purchased with full knowledge of the occupancy and possession up to such line.

We find no error in the proceedings, and the judgment will be affirmed, with costs.

The record in this case will be remanded to the court below for further proceedings under the statute, if desired.

BOUNDARIES — Parol agreements as to boundary lines between adjoining land-owners: Note to *Smith v. Dudley*, 13 Am. Dec. 224, 225. Settlement of disputed boundary line by express or implied agreement: Note to *Kip v. Norton*, 27 Id. 121, 122. Establishment of boundaries by parol agreement or acquiescence: Note to *Terry v. Chandler*, 69 Id. 711-713; note to *Turner v. Baker*, 27 Am. Rep. 239-244; note to *Evans v. Miller*, 38 Id. 315-321.

BOUNDARIES — **AGREEMENT** — **ACQUIESCENCE** — **ESTOPPEL**. — The acquiescence by an owner of land, manifested by silent submission, apparently with his consent, for a period of sixteen years, in the location of a fence as the dividing line between his land and that of an adjoining land-owner, operates to estop such a one from denying the correctness of such boundary: *Burris v. Fitch*, 76 Cal. 395. Land-owner recognizing a false boundary as the true one, by mistake, for over thirty years, and holding it out as the correct boundary to adjoining owners, who acted upon such representation in good faith, is estopped to assert any other boundary as the true one: *Galbraith v. Lunsford*, 87 Tenn. 89, and cases there cited. Where adjoining proprietors, in good faith, agree upon a boundary line, in which each acquiesces for the statutory period, the line thus established is binding upon them, and those holding under them: *White v. Spreckles*, 75 Cal. 610; *Atchison v. Pease*, 96 Mo. 566. Adjoining owners may adopt, by parol agreement, a boundary line, whether the correct one or not, or may do such unequivocal acts as will raise the implication that they have agreed to such boundary line, and they will be conclusively bound thereby, and estopped from disputing such line: *City of Bloomington v. Bloomington etc. Ass'n*, 126 Ill. 221. Owners of adjacent lands agreeing upon a boundary line are bound thereby, although the

agreement is by parol: *Edwards v. Smith*, 71 Tex. 156; but an agreement of this kind, acquiesced in for less than the statutory period of limitation, to be binding, must have been made with the understanding that it should be so regarded: *Bird v. Stark*, 66 Mich. 655.

SLATER v. CHAPMAN.

[97 MICHIGAN, 581.]

PLEADING AND PRACTICE. — **OBJECTION NOT MADE AT TRIAL**, not included in any assignment of error, cannot be urged for the first time in the appellate court.

MASTER AND SERVANT — **NEGLIGENCE.** — Where a foreman has the whole charge of the erection and construction of a building, and exercises full control over it in the place of his employer, the negligence of the foreman is the negligence of the employer, who is liable therefor, whether he knew that the foreman was careless or incompetent or not, provided the workman injured was not in fault, but used due care and caution.

Pailthorp and George, and Taggart, Wolcott, and Ganson, for the appellant.

Cruickshank and Grier, for the plaintiff.

MORSE, J. This action was brought by the plaintiff to recover damages for an injury resulting from a fall while he was employed as a carpenter about the construction of a hotel, which the defendant was building at Bay Springs, in Charlevoix County.

The theory of the plaintiff upon the trial was, that the injury was occasioned, without fault on his part, through the negligence of one Charles Sizer, who had the whole charge and management of the work and the workmen employed in the building of the hotel, and that the defendant was liable for the result of Sizer's negligence, because he knew that Sizer was careless and negligent, and kept him in his employ and in charge of the work after such knowledge of his incompetency by reason of such carelessness and negligence; and also because, Sizer being employed by the defendant to take the whole charge of the erection of the building, and exercising full control over it in the place and stead of defendant, his negligence was the negligence of the defendant, even if the defendant had no knowledge that Sizer was incompetent or careless.

There seems to be no dispute about the reason of the accident. A temporary staircase had been erected connecting the second and third stories of the hotel. This stairway was ke

from sliding or slipping by a cleat at the bottom. In putting in the permanent stairway, it became necessary to remove this cleat. Sizer removed it without the knowledge of the plaintiff. After its removal, he ordered plaintiff to go up the temporary stairs to work about the permanent stairway. When near the top, the stairs gave way on account of the removal of the supporting cleat, and the plaintiff was precipitated into the basement below, severely injuring him.

He recovered a judgment for one thousand dollars.

It is claimed by the counsel for the defendant that the proofs in the case were at variance with the declaration, which avers that the removal of this cleat was with the knowledge and consent of the defendant, who was present, while the evidence shows that Chapman was absent and knew nothing about it.

It appears, however, from the record, that no claim of this kind was made upon the trial, nor is there any assignment of error that covers it. It cannot now be raised here for the first time.

The other errors assigned relate to the charge of the court.

We think that the court very fairly and properly instructed the jury as to the law of the case.

Every request of the defendant's counsel was given in the exact language of the counsel, and without modification.

The court instructed the jury, in substance, that if Sizer was employed by the defendant to take the whole charge of the erection and construction of the hotel, and exercise full control over it, in the place of the defendant, than the negligence of Sizer would be the negligence of the defendant, who would be liable for such negligence, no matter whether he knew Sizer was incompetent or careless, or not; and also that if the injury was occasioned by the negligence of Sizer, the defendant would be liable for the same if he knew Sizer to be incompetent and careless, and Sizer was in fact a careless and negligent workman in the place where the defendant had put him, provided, however, in either case, that the plaintiff himself was not in fault, for the plaintiff must also show that he was ignorant of these faults in Sizer, and ignorant of the removal of the cleat, and that he exercised all the care and caution that a competent workman in his calling would have exercised under like circumstances; and that if the plaintiff, in going upon the stairs to work, when he was ordered to do so by Sizer, without first examining them to determine their

safety, did not thereby exercise the care and caution which common prudence would require in one of his calling, he could not recover, notwithstanding the negligence of Sizer.

It is contended here that there was no evidence tending to show that Chapman had any knowledge that Sizer was careless or negligent in his work as foreman, or that in fact Sizer was so careless or negligent. There was evidence tending to show not only that Sizer was careless in removing this cleat, and then sending the plaintiff upon the stairway, but that he was careless in other respects as to the fastenings of braces and other supports upon which the workmen must rest in the process of the work upon this building. There was also testimony that Chapman said after the accident that he knew Sizer was careless, and "expected he would kill somebody," and that he "was the man who built the grand-stand at Adrian." This testimony was not denied by the defendant, as appears from the record.

It is also insisted that because the foreman, Sizer, worked himself about the building the same as the other carpenters, and at times with them, he was a fellow-servant of the plaintiff, in law, and therefore the direction of the court below was erroneous in instructing the jury that his negligence might be considered the negligence of Chapman.

There was testimony tending to show that Sizer was something more than a mere foreman or boss-workman. If he had the full charge and control of this building and the men employed thereon delegated to him by the defendant, and his agency covered the entire building, and his capacity and discretion dominated over it, in respect to his legal accountability, he stood in the shoes of his principal, Chapman, and his negligence was the negligence of the defendant without question: *Mining Co. v. Kitts*, 42 Mich. 34; *Ryan v. Bagaley*, 50 Id. 179, 180; 45 Am. Rep. 35; *Willis v. Navigation Co.*, 11 Or. 257; *Rodman v. Railroad Co.*, 55 Mich. 62; 59 Id. 395; 54 Am. Rep. 348.

We find no error in the proceedings upon the trial, and the judgment of the court below will be affirmed, with costs.

APPELLATE PRACTICE. — Errors complained of must always be affirmatively shown: *Mills Co. Nat. Bank v. Perry*, 72 Iowa, 15; 2 Am. St. Rep. 228, and note 230; *Aspinwall v. Sabin*, 22 Neb. 73; 3 Am. St. Rep. 258, and note 261; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525; 5 Am. St. Rep. 697, and note 699; *Roberts v. Parrish*, 17 Or. 583; *Hughes v. State*, 27 Tex. App. 127; *State v. Chee Gong*, 17 Or. 635; *Bewley v. Graves*, 17 Id. 274; *Swift v.*

Mulkey, 17 Id. 532; *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38; *Village of Melrose v. Bernard*, 126 Ill. 496; *Baker v. Chatfield*, 23 Fla. 540; *Mattlinger v. Lake Shore etc. R'y Co.*, 117 Ind. 136. No ruling will be reviewed to which exception has not been taken: *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501; and so objections not made on motion for a new trial are not noticed on appeal: *Turner v. Johnson*, 95 Mo. 431; 6 Am. St. Rep. 62, and note 74. Only such exceptions as are made before the court below will be considered in the appellate court: *Allen v. Railroad*, 102 N. C. 381; *Gray v. Chicago etc. R'y Co.*, 75 Ind. 100; *McReynolds v. McReynolds*, 74 Iowa. 89; *Richardson v. Woodring*, 74 Id. 149; *Parker v. Michael*, 74 Id. 209; *Brown v. Landon*, 11 Col. 162; *Nelson v. Wilson*, 72 Iowa, 710; *Lewis v. Lewis*, 75 Id. 669; *Wyland v. Frost*, 75 Id. 209; *Cooper v. Davidson*, 86 Ala. 367; *Street R'y Co. v. Morrow*, 87 Tenn. 406; *McDaniel v. Adams*, 87 Id. 756.

MASTER AND SERVANT. — The master cannot evade his duty to his servant by delegating its performance to another: *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844; *Fisk v. Central Pac. R. R. Co.*, 73 Cal. 38; 1 Am. St. Rep. 22. Master is liable for the negligence of an agent or subordinate to whom he intrusts the entire charge of his business: *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Ryan v. Bayaley*, 50 Mich. 179; 45 Am. Rep. 35, and note; note to *Rodenas v. Michigan etc. R. R. Co.*, 54 Am. Rep. 353; *Hussey v. Coyer*, 112 N. Y. 614; 8 Am. St. Rep. 787; *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336, and note 342, 343.

GALLOWAY v. ESTATE OF MCPHERSON.

[67 MICHIGAN, 543.]

WIFE'S FUNERAL EXPENSES. — Where a husband is able, it is his duty to pay his wife's funeral expenses, and in the absence of proof of his inability so to pay, they cannot be charged against her estate.

J. Fuller, for the appellant.

Alexander D. Fowler, for the estate.

SHERWOOD. J. Mrs. McPherson, at the time of her death, lived with her husband, James McPherson. She died, leaving an estate of between two thousand and three thousand dollars, and John Galloway, the appellant, was appointed executor of her will.

The funeral expenses and doctor bills of Mrs. McPherson during her last sickness amounted to the sum of \$163, and the executor asked her husband to pay them, which he did.

The executor, on rendering his final account, included this sum among his disbursements, it standing in the account as an item for money: "Paid James McPherson for money advanced by my direction to the undertaker and doctors for services and funeral expenses."

On appeal by the executor from the disallowance to the

circuit court for the county of Wayne, where a trial was had, Judge Speed directed the verdict of the jury in favor of the estate.

It does not appear but that the husband was able to pay his wife's funeral expenses, and it was his duty to do so: *Sears v. Giddey*, 41 Mich. 590; 32 Am. Rep. 168; *Jenkins v. Tucker*, 1 H. Black. 90; *Ambrose v. Kerrison*, 10 Com. B. 776; *Macqueen on Husband and Wife*, 191; *Bradshaw v. Beard*, 12 Com. B., N. S., 344; *Bertie v. Chesterfield*, 9 Mod. 31; *Methodist Church v. Jaques*, 1 Johns. Ch. 450; *Durell v. Hayward*, 9 Gray, 248; 69 Am. Dec. 284.

The judgment at the circuit will be affirmed, with costs.

HUSBAND AND WIFE. — The husband is liable for the funeral expenses of his deceased wife: *Sears v. Giddey*, 41 Mich. 590; 32 Am. Rep. 168, and note 170; *Durell v. Hayward*, 9 Gray, 248; 69 Am. Dec. 284; compare *Van Buren v. Superior Court*, 76 Cal. 589; 9 Am. St. Rep. 258, and note.

McKAY v. WILLIAMS AND McNERNA.

[67 MICHIGAN, 547.]

PRINCIPAL AND AGENT — POWER OF ATTORNEY — CONVEYANCE BY AGENT.

— Where an attorney in fact executes a deed in the name of his principal, and the grantee therein, on the same day, by another deed, conveys the same land back to the attorney in fact, both deeds are *prima facie* fraudulent and void upon their face, and the principal is not bound by them, but may repudiate the conveyances, and recover the land in an action of ejectment.

REMEDY — FRAUD OF AGENT OR TRUSTEE. — Where the misfeasance or fraud of an agent or trustee appears upon the face of his conveyances, the remedy may be administered in a court of law as well as in a court of equity.

PRINCIPAL AND AGENT — CONVEYANCE — PURCHASER FROM ATTORNEY IN FACT. — Where an attorney in fact conveys land by deed in the name of his principal, and the grantee therein, on the same day, deeds the land back to such attorney, both deeds are *prima facie* void, and the purchaser from the attorney is not a purchaser in good faith, but is bound by what appears in the chain of title through which he claims, but is chargeable with notice of the fraud which appears upon the face of the deeds.

IN EJECTMENT, ALL DEFENSES are excluded that are not legal, and neither equitable titles nor equitable defenses can avail as basis of recovery or defense.

D. E. Corbitt, for the appellant.

Maher and Felker, for the defendants.

CHAMPLIN, J. Plaintiff brought ejectment against defendants.

Mary McNerna is made a party simply as tenant in possession under her co-defendant at the time the suit was brought.

On the twenty-first day of May, 1886, one Ida J. Shults was the owner of the premises in question. On that day she executed to her husband, Oliver C. Shults, a power of attorney to convey, by good and sufficient deed, said premises. This was recorded in the Kent County register's office on the ninth day of June, 1886, at 8:45 o'clock, A. M. On the same day, Oliver C. Shults, as attorney in fact for Ida J. Shults, executed a deed in the name of his principal of the premises in question to Henry H. Knight. This was duly witnessed and acknowledged. And again, on the same day, Henry H. Knight executed a deed of the premises to Oliver C. Shults. This was also witnessed and acknowledged. Both these deeds purported to be for the consideration of six hundred dollars. The notary who drew the deeds and took the acknowledgments saw no money consideration pass between the parties. Both deeds were recorded the same day, and at the same time.

On the 27th of July, 1886, Ida J. Shults conveyed the premises to the plaintiff in this suit, and on July 9, 1886, Oliver C. Shults conveyed the premises to Jane A. Williams, defendant.

The plaintiff claims that the deeds from Ida J. Shults, executed by Oliver C. Shults as her attorney in fact, to Knight, and from Knight to Oliver C. Shults, are fraudulent and void upon the face of the transaction; that they show upon their face the case of an agent conveying the property of his principal to himself, and that they should be so declared by the court in an action of ejectment brought by the principal or her grantee.

The judge of the superior court of Grand Rapids, before whom the case was tried, held that, in the absence of proof of actual fraud, the title to the property passed from Ida J. Shults to Knight, and from Knight to Oliver C. Shults, and from him to defendant Williams; and consequently, the plaintiff acquired no title by virtue of his deed from Ida J. Shults.

If, as the judge of the superior court held, the legal title passed by the deeds to defendant notwithstanding the apparently fraudulent transaction between Oliver C. Shults and Knight, then the later deed, executed by Mrs. Shultz to plaintiff, only conveyed an equitable title, the defendant be-

ing simply a trustee of the legal title for the plaintiff, and the remedy of plaintiff would be in equity to compel a conveyance of the legal title by Williams to McKay.

Plaintiff's counsel contends that the fraud which presumptively exists upon the face of the papers vitiated the transaction, and rendered the deeds wholly void, and therefore the legal title did not pass by the execution of the deeds; that Mrs. Shults held the legal title all the time until she conveyed it to plaintiff. Here, then, there are two persons, each claiming the legal title to the same real estate, and who trace their source of title to a common grantor.

The record discloses that Oliver C. Shults, as attorney in fact of Ida J. Shults, on the 9th of June, 1886, conveyed the premises to Knight, and that he immediately reconveyed them to Oliver C. Shults. These deeds, bearing the same date, executed between the same parties, conveying the same subject-matter, must be construed together. The language they speak is plain. By this transaction, the agent authorized by Ida J. Shults to sell the land in question, and convey the same, has sold and conveyed it to himself.

Such a transaction cannot stand. It bears upon its face its own condemnation. It is *prima facie* void, and as between the parties, the principal is not bound by the deeds, and may repudiate the transaction and recover the land. Public policy will not tolerate such misdoings on the part of an agent, and courts will not stop to inquire whether a fraud was intended, but looking alone at the relation of the parties, will, upon that relation appearing, declare the conveyance invalid: *Gillett v. Peppercorne*, 3 Beav. 78; *Wharton on Agencies*, sec. 232; 2 *Sugden on Vendors*, c. 20, sec. 2; *Gilbert v. Burgott*, 10 Johns. 457; *Clafin v. Bank*, 25 N. Y. 293; *Obert v. Hammel*, 18 N. J. L. 74; *Michoud v. Girod*, 4 How. 503; *Clute v. Barron*, 2 Mich. 192.

In very many of the cases which have been brought to the attention of the courts, the agents or trustees have so covered their misfeasance as to make it necessary for the injured party to go into a court of equity to obtain adequate relief. But when the fraud appears upon the face of the papers or conveyances, the remedy can as well be administered in a court of law as in a court of equity. Thus in *Clafin v. Bank*, cited above, an action was brought to recover upon three checks drawn by the president of the bank, and certified by its president as good. The defense that the president committed an

abuse of his fiduciary relations with the bank was permitted to be shown. Judge Selden said: "The act of the agent is deemed to be unauthorized, and the contract is void"; and that "there could be no *bona fide* holder of such an instrument," for the reason that the want of authority in the president to bind the bank appeared on the face of the check.

In *Gilbert v. Burgott*, *supra*, which was a contest between the grantee of an unrecorded deed and a subsequent grantee who first placed his deed of record, the court held that actual notice to the second grantee of the existence of the unrecorded deed might be shown in an action of ejectment. Chief Justice Kent held that the action of the subsequent grantee in obtaining and recording a deed when he had notice of the first conveyance was a fraud upon the holder of the unrecorded deed; and he said: "Fraud will invalidate in a court of law as well as in a court of equity, and annul every contract and every conveyance infected with it."

Obert v. Hammel, 18 N. J. L. 74, was a case in point, and the court held in an action of ejectment that the sale and conveyance could be avoided in a court of law; citing several English cases in support of the position.

It is laid down by Sugden on Vendors and Purchasers, and supported by numerous authorities, that "where the trustee buying is the trustee for sale, the purchase is absolutely void": C. 20, sec. 2, 8th Am. ed., 689, note n.

"So careful," said Mr. Justice Manning, in the case of *People v. Township Board of Overysel*, 11 Mich. 222, "is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction; as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances."

Mr. Justice Christiancy concurred with Justice Manning. Mr. Justice Campbell assented to the general doctrine stated, that the same person cannot be vendor and purchaser, because his contract lacks the necessary elements of two parties; but he also stated that "even these contracts, however, are not universally void. They are usually voidable at the option of the party defrauded or affected, but they are not absolutely void, except where, by reason of the identity of vendor and vendee, a contract in the eye of the law is impossible": *Rail-*

way Co. v. Dewey, 14 Mich. 477, 488; *Sheldon v. Estate of Rice*, 30 Id. 296; 18 Am. Rep. 136.

In these two cases the doctrine was again asserted, the first being a chancery case, and the other a case at law.

In cases of sales by executors, administrators, and guardians, the statute expressly forbids them to purchase, directly or indirectly, and declares sales made in violation of that section void: Howell's Stats., sec. 6042. This statute was merely an affirmation of the common law.

Attention is called by counsel for the defendants to the remarks of Mr. Justice Elmer in *Runyon v. India Rubber Co.*, 24 N. J. L. 475, criticising the former decisions in that state, which held that ejectment might be brought by the heirs to recover land fraudulently conveyed by an administrator to himself; and in *Obert v. Obert*, 12 N. J. Eq. 427, where it is said that "there can be no doubt that, according to the decided weight of authority, the principle that a trustee cannot be the purchaser of the trust estate is a mere rule in equity, and that if proper forms are observed the conveyance is good at law."

We think that the principle has a broader foundation than a mere rule in equity. Mr. Justice Cooley, in *Sheldon v. Estate of Rice*, *supra*, said: "The law esteems it a fraud in such a trustee to take, for his own benefit, a position in which his interest will conflict with his duty."

It cannot be claimed that Mrs. Williams is a good-faith purchaser, without notice of the invalidity of her grantor's title. A purchaser of real estate is bound by what appears in the chain of title through which he claims. The defendant was chargeable with notice of the fraud which appeared upon the face of the conveyances. If defendants have equities which entitle them to relief in the court of chancery, there is no obstacle to their applying to such court. The bill of exceptions shows that defendant Williams has filed her bill of complaint, in which she sets forth that she agreed to pay four hundred dollars for the land, and paid one hundred down, and prays for equitable relief.

In holding that the deeds introduced by the defendants are *prima facie* void upon their face, we do not militate against the rule declared by this court in several cases that in ejectment all defenses are excluded that are not legal, and that neither equitable titles nor equitable defenses can avail either as a basis of recovery or of defense. The plaintiff does not

claim to recover upon the strength of an equitable title, and under the facts of this case the judgment should have been given for the plaintiff.

The judgment must be reversed, and a judgment entered here upon the finding in favor of plaintiff, with costs of both courts.

The record will be remanded, in order that further proceedings may be had under the statute, if desired.

EJECTMENT. — Plaintiff in an action of ejectment must recover, if at all, on the strength of his legal title, and a mere equitable title in him will not warrant a recovery: *Barrett v. Hinckley*, 124 Ill. 32; 7 Am. St. Rep. 331, and note 341. But under the codes, equitable titles can be set up as defenses to actions in ejectment: *Shasakun v. Long*, 26 Iowa, 488; 96 Am. Dec. 164; *Meeker v. Dalton*, 75 Cal. 154; *Hurd v. Harvey County*, 40 Kan. 92; *Helm v. Wilson*, 76 Cal. 476; *Clay v. Wood*, 71 Tex. 460; and when an equitable defense is pleaded, such defense must be determined unfavorably to the defendant before plaintiff's legal title can prevail: *Allen v. Logan*, 96 Mo. 591. Plaintiff must establish title in himself, and it is not sufficient to show that defendant has no title: *Glenn v. Jeffrey*, 75 Iowa, 20; or that the legal title is in a third party: *Foot v. Murphy*, 72 Cal. 104.

WRIGHT v. DICKINSON.

[67 MICHIGAN, 580.]

ASSUMPSIT — BILL OF PARTICULARS — EVIDENCE OF VOID CONTRACT. —

Where plaintiff declares in *assumpsit*, and afterwards files a bill of particulars praying the recovery of money paid on land contracts without consideration, alleging that defendant had no title to convey, he may prove such contracts void for want of due execution under the statute of frauds, when the defendant does not claim that such evidence would be a surprise to him, or that he is unprepared to meet it.

BILL OF PARTICULARS is considered in some respects as an amplification of the declaration, but it is sufficient if it fairly apprise the opposite party of the nature of the claim, so that there can be no surprise.

VENDOR AND VENDEE — RECOVERY OF MONEY PAID ON VOID LAND CONTRACT. — An action to recover money paid on void land contracts is not premature on the ground that the invalidity of the contracts was declared in an adjudication subsequent to the commencement of this action.

VENDOR AND VENDEE — FAILURE TO MAKE TITLE UNDER CONTRACT TO CONVEY. — Purchase-money paid for land can be recovered in an action for money had and received, whether the consideration fails for want of title or for want of a valid contract to convey, and in either case the purchaser must place the vendor *in statu quo*, so far as it is practicable for him to do so; and the equities, so far as they can be measured by a pecuniary standard, can be settled and adjusted in the suit.

VENDOR AND VENDEE — CONTRACT TO CONVEY — FAILURE TO MAKE TITLE — TENDER OF PERFORMANCE. — Where the vendee has agreed to pur-

chase and the vendor to convey land in fee, and the latter cannot make title, the former may bring his action to recover the purchase-money paid without first tendering performance.

VENDOR AND VENDEE — CONTRACT TO CONVEY — FAILURE OF TITLE — RESCISSION OF VOID CONTRACT. — A void contract for the purchase of land need not be rescinded before bringing an action to recover the purchase-money paid under it.

VENDOR AND VENDEE — CONTRACT TO PURCHASE — RESCISSION — STATUS QUO. — Where property received under a contract to purchase has been changed or lost without the fault of the vendee, so that it cannot be restored in specie, but its value may be ascertained, and the vendee is entitled to rescind the contract, he may do so without tendering performance, or placing the vendor *in statu quo*, and in an action to recover the money paid on the contract, the equities of the parties will be fully adjusted.

Padgham and Padgham, and Edward Bacon, for the appellant.

Howard and Roos, for the defendants.

CHAMPLIN, J. Plaintiff declared against the defendants upon the common counts in *assumpsit*, and filed therewith a bill of particulars, as follows:—

"Sirs,—Please to take notice that the following is a bill of particulars of the plaintiff's demand in this cause, and for the recovery of which this action is brought, to wit:—

"The plaintiff's bill of particulars is for moneys paid on a certain land contract made by Chase H. Dickinson and William F. Dickinson and the plaintiff above named, of which exhibit B hereto annexed is a true copy; and plaintiff's claim is, that the land described in said contract was not, at the date of said contract, owned by said William F. Dickinson and Chase H. Dickinson, defendants above named, nor have they since owned said real estate in fee, and have never been the owners of said real estate, so that they could convey to said plaintiff a good and unencumbered title in fee-simple; and said plaintiff claims that the moneys were so paid by him on such land contract without any consideration.

"The amounts and dates of such payments are as follows:—

1872.

July 20. To cash paid by plaintiff to defendants. . \$100

Sept. 20. To cash paid by plaintiff to defendants. . 400

\$500

"The plaintiff's bill of particulars is further for moneys paid on a certain other land contract made by said Chase H.

Dickinson and William F. Dickinson and the said John A. Wright, of which exhibit A hereto annexed is a true copy.

"And plaintiff claims that the said William F. Dickinson and Chase H. Dickinson never were the owners of the land described in this contract, so that they could give to the said plaintiff a title in fee-simple.

"The amounts and dates of such payments are as follows:—

1872.

July 20. To cash paid said defendants..... \$100

Sept. 18. To cash paid said defendants..... 1,400

Nov. 8. To cash paid said defendants..... 100

\$1,600

"Dated December 18, 1880."

Exhibits A and B referred to in the bill of particulars are two land contracts, being the same contracts passed upon by this court in the case of *Dickinson v. Wright*, 56 Mich. 42.

The defendants pleaded the general issue.

On the trial of the cause before a jury, the land contract, exhibit A, was introduced in evidence. It was signed by Chase H. Dickinson, and said Chase H. Dickinson signed the name of William F. Dickinson. Attention of plaintiff, who was a witness in his own behalf, was called to the words: "This contract approved. William F. Dickinson,"—indorsed on the contract, and he stated that he did not know anything about the indorsement; that it was not there when it was made. The witness's attention was called to a like indorsement on exhibit B, and he was asked: "Do you know at any time of any indorsement of the words, 'contract approved,' and signed 'William F. Dickinson,' on the back thereof?" To which he answered, "No, sir."

The question was then again repeated as to the indorsement upon exhibit A, to which the defendants objected, on the ground that it was irrelevant and immaterial under the issue in this case, and under the bill of particulars as furnished in this case; that the plaintiff had declared and furnished a bill of particulars, declaring upon the contract as a valid one, and he was bound by his bill of particulars.

Counsel for plaintiff disclaimed having declared upon the contract, or seeking to recover for a breach of it. He stated that he sought to recover back money paid to defendants under the count for money had and received, because the con-

tract was void under the statute of frauds, and because there was no consideration, as the defendants had no title which they could convey. But the court held that the plaintiff was confined to the declaration as he had made it, and that there was no notice given that plaintiff sought to recover because this contract was not a binding contract; but on the contrary, the only inference from the bill of particulars was that it was a valid contract, and that the trouble was that they had no title to convey; that under the declaration and bill of particulars he did not think it was competent to show that this contract was void for want of due execution, and sustained the objection.

We think the court erred. The declaration was for money had and received. The bill of particulars pointed out that the plaintiff sought to recover back money paid without consideration. Whether the want of consideration arose from the fact that the defendants had no title to convey, or whether the contract was void for want of due execution, was not material to be stated, only so far as such statement was proper to apprise the defendants of the claim of plaintiff, and afford them an opportunity to be prepared to try the case upon the merits. Defendants did not claim that this evidence would be a surprise to them, or that they were not prepared to meet such evidence upon the trial.

A bill of particulars, in practice, is considered in some respects as an amplification of the declaration, but it is considered sufficient if it fairly apprise the opposite party of the nature of the claim, so that there can be no surprise: *Brown v. Williams*, 4 Wend. 380.

In *Davies v. Edwards*, 3 Maule & S. 380, the action was for debt upon a demise of land, and the plaintiff furnished a bill of particulars describing the premises as being in a certain parish, and on the trial introduced an indenture of demise between the parties of lands in another parish. It was insisted that by reason of this misdescription in the bill of particulars the plaintiff could not recover. The trial judge overruled the objection, being of opinion that the bill of particulars disclosed substantially the subject-matter of the action, which was rent; and it not appearing that the defendant was misled by it, a verdict was entered for the plaintiff. On a rule *nisi* obtained, Lord Ellenborough, C. J., said: "If the defendant could have shown, not only that he might have been but that he was actually surprised, there would have

been some foundation for the argument"; and he discharged the rule.

So in this case, the subject-matter is the money which the defendants have had of the plaintiff, the consideration for which has failed. Here it seems to me that the plaintiff has been shut out by a strict construction, and concluded by a particular, fairly meant, against the justice of his case: See also *Duncan v. Hill*, 2 Brod. & B. 682; *McNair v. Gilbert*, 3 Wend. 344.

In *Davis v. Freeman*, 10 Mich. 188, this court said: "The office of a bill of particulars is to inform the opposite party of the cause or causes of action the party giving it intends to rely on at the trial, not specifically set out in the declaration or notice accompanying the general issue."

And in *Freehling v. Ketchum*, 39 Mich. 299, it was said: "The purpose of the rules in allowing bills of particulars to be demanded is to enable defendants to avoid surprise, and not to enable them to make vexatious requirements."

In *Cicotte v. Wayne Co.*, 44 Mich. 173, Mr. Justice Graves said: "The object of the practice for the production of bills of particulars is to obviate the uncertainty of general pleading. The intent is to secure such information as will enable the parties to make an intelligent preparation for trial, and to enter upon the investigation before the court or jury with an understanding as to what is really in controversy. The bill is often mentioned as being an amplification of the declaration, or as entitled to be considered as a part of the pleading. But such expressions are metaphorical. The bill is never, in strictness, a component of the pleading. It may have the effect of a pleading in so far as it restricts the proofs to what it contains."

This case is cited by defendants' counsel to support the ruling of the court below. The statement of the learned judge is accurate, but the question to be determined is, what proofs are admissible under the contents of the bill, and is the variance, if any, harmful to the opposite party, in that it operates as a surprise to him? *Collins v. Beecher*, 45 Mich. 436.

The plaintiff then testified to the money paid to the defendants upon the contracts, and that the lands were mostly timbered lands, and he made the arrangements to purchase them for the timber.

On cross-examination he testified that he went to lumbering on the lands in the winter of 1872 and 1873, and also that he

leased the right of way for a horse-railroad, — a lumber-railroad, — to go across section 4, to Samuel Rogers. This lease was offered in evidence by defendants, and was dated July 12, 1872, for the term of fifteen years. Plaintiff further testified that the railroad had been abandoned for years. He also testified that he had cut probably about one hundred and fifty thousand feet of white pine on sections 17 and 18, and took off four or five oak-trees from section 4; that he never paid, or offered to pay, the defendants for the timber so taken off, and never paid, or offered to pay, the balance payable by the contracts.

It appeared on the trial that in the spring of 1873 the defendants were enjoined by the United States court from cutting timber on the land covered by the contracts, and that injunction was also served upon the plaintiff, in consequence of which he quit lumbering upon the lands; that plaintiff informed Dickinson that he was enjoined, and he advised that he stop cutting, which he did; and that since that time in 1873 the plaintiff has not been in the possession of or occupied it, or in any manner has been possessed of the land.

The plaintiff's counsel then offered in evidence the original patent of the United States to Mary Hannahs, covering the land named in the contracts, for the purpose of showing that the title was not in the Dickinsons, as plaintiff had claimed; to which defendants' counsel objected, and stated his reasons as follows: —

"For the same reason that, under the admissions of the plaintiff himself upon the stand, he cannot recover in this action; for the reason that he admits that he cut off of sections 17 and 18 a matter of one hundred and fifty thousand feet of pine, and on section 4 has cut some timber, — some ten dollars' worth, — and has executed a lease for fifteen years of a certain other part of it which had not expired at the time of the commencement of this suit; and for that reason it was impossible, at the time this suit was commenced, for him to rescind and place us *in statu quo*; and that, under the testimony of the plaintiff himself, he cannot maintain this action.

"We object to it on the further ground that the plaintiff admits himself, upon the stand, that he never tendered any money to Mr. Dickinson on this contract, other than the payments already made, and that he never demanded a deed; and that these defendants were under no obligation to make

him a deed, or perfect their title, until such time as he was willing and made a tender of the purchase price.

"To make our objections cover all points, we repeat here that we object to the introduction of this question of title, or any other evidence in the cause, because, from the admission of Mr. Wright, the plaintiff, upon the stand, he was in no position to rescind, and could not in law rescind this contract.

"2. That from like admission of plaintiff on the stand it appears that he has not in fact rescinded (that is, independent of the question whether he could or not).

"Now, provided he could rescind, the evidence shows that he has not rescinded, and never gave any notice of rescission, or has never taken any steps in fact to rescind, before the commencement of this suit."

The court sustained the objection and excluded the testimony.

The plaintiff's counsel then made the following offer, namely:—

"I desire to make this offer in this case: That we admit this plaintiff shall pay, and the defendants shall have deducted and allowed to them, the full amount of all timber or anything else that was taken from this land by the plaintiff, or by his agents, up to the commencement of this suit. And I now offer to show in the case, as we have started to show,—

"1. That the defendants, at the time plaintiff demanded his money back, and before this suit, had no title to the land at the time the suit was commenced.

"2. That at the time the plaintiff took the contract and paid the money on it, he supposed the defendants had a title to the land, and did n't know to the contrary until a short time before this suit was commenced; that at the time this suit was commenced, he had fully investigated the title; that he then knew the owners of the land, and informed Mr. Dickinson who they were.

"3. That the land was bought for the timber only; that the plaintiff was restrained and enjoined from cutting or removing timber or trees from any of these lands, by an injunction issued out of the circuit court of the United States for the western district of Michigan, in a suit wherein the creditors of one Timothy Morse (who, in his lifetime, owned these lands, and the lands then belonged to his estate) were complainants, and the defendants were the Dickinsons and one Seaver, and that that suit was commenced, and an injunction issued, be-

cause of the fraudulent practices of the Dickinsons, the defendants in this suit; that Mr. William F. Dickinson, in collusion with the administrator of the estate of Timothy Morse, caused these lands to be sold, whereby he could get a title without paying any value for them, and it was through that title that they were pretending to claim when they were going to sell to plaintiff; that plaintiff investigated that matter at the time he investigated the title.

"4. That this injunction remained in full force up to the year 1878.

"5. That during the pendency of this injunction, the fires had destroyed the timber on these lands, and without the fault or neglect of plaintiff.

"6. That since this suit was brought, these defendants have sold and conveyed these lands to other parties."

"The Court: The objection to the offer of the patent, or other evidence of title in this case, will be sustained."

Plaintiff's counsel here offered in evidence the record and files in a case wherein the Dickinsons (these defendants) were plaintiffs, and Mr. Wright (this plaintiff) was defendant, being the case reported in 56 Mich. 42, which was objected to by defendants' counsel as irrelevant and immaterial, which objection was sustained by the court, and to which ruling the counsel for plaintiff did then and there except. We think the court erred.

The plaintiff's cause of action was not entirely based upon the contracts.

In *Dickinson v. Wright*, 56 Mich. 42, these same contracts were in issue. The Dickinsons, in that case, brought suit to recover the balance of the money payable by the terms of these contracts, and failed, for the reason that the contracts were void under the statute of frauds, for the want of authority in Chase H. Dickinson to sign William F. Dickinson's name thereto. The invalidity of the contracts in question was settled by that adjudication; and it does not matter that this suit was first commenced. The fact that rendered the contracts invalid did not appear until upon the trial of that case. The issue, however, in this suit was broad enough to admit evidence of the invalidity of the contracts in question.

Purchase-money paid for the purchase price of land can be recovered in an action for money had and received, whether the consideration fails for want of title or for want of a valid contract to convey.

In either case, the purchaser must place the other party *in statu quo*, so far as is practicable for him to do so; and in either case, the equities, so far as they can be measured by a pecuniary standard, can all be settled and adjusted in the suit.

In this case there is no occasion to call for the interposition of a court of equity. There are no deeds to be surrendered up and canceled, nothing which is required to be perpetuated by a decree. All there is to be ascertained can be ascertained by a jury; and that is, how much in equity and good conscience ought the defendants to repay of the purchase-money they have received. All benefits which the plaintiff has received will have to be deducted, and these can be ascertained and allowed for in a common-law proceeding. The value of the timber cut and removed, and all other benefits which the plaintiff has derived from these contracts, can be adjusted in this action.

A void contract needs no rescission. But if these contracts were valid, and the plaintiff, either on account of want of title in defendants, or because they have placed it out of their power to perform, rescinded the contract, he could do so, under the circumstances of this case, without either tendering performance or placing the parties *in statu quo*. Through procrastination and delay, for which he was not in fault, the subject-matter of the contracts which formed his inducement to purchase has been destroyed. Under such circumstances, must he tender the purchase-money? It would be unreasonable to require it. Must he place the defendants *in statu quo*? That is impossible.

Plaintiff entered into the contract in good faith, paid his money according to the agreement, and went on and severed one hundred and fifty thousand feet of pine, the timber which he bought for the purpose of manufacturing into lumber. He cannot restore the severed trees. It is impossible for him to restore the property in the same condition it was when he received it. The law does not require impossibilities to be performed. The only thing he can do is to restore its money equivalent, and that he offers to do.

In cases where, acting in good faith, property has been so changed or lost that it cannot be restored in specie, and where its value is capable of being ascertained, a party entitled to may rescind a contract, although he cannot place the other party *in statu quo*. That is the law of reason, and it is the

law of justice. If the current of authority is the other way, based upon technicalities, I cannot yield my assent to the doctrine.

As no rule of property is involved, and as the rights of the parties can be settled and determined in this equitable action, I must hold that the learned judge erred in excluding the testimony offered.

The judgment must be reversed, and a new trial granted.

BILL OF PARTICULARS IS AMENDABLE, like a declaration: *Babcock v. Thompson*, 3 Pick. 446; 15 Am. Dec. 235.

RESCISSIOM OF A CONTRACT FOR THE PURCHASE OF REALTY. — When a contract for the purchase of realty is rescinded, the parties should be placed *in statu quo*: *Humble v. Hinkson*, 3 A. K. Marsh. 468; 13 Am. Dec. 195; *Hynson v. Duen*, 5 Ark. 395; 41 Am. Dec. 100. Where a vendor agrees to convey, and upon the payment of money and the execution of notes, at a certain time before that time conveys to another, the vendee averring readiness to perform his part of the contract need not make a tender of performance, and in such case, if a part of the money has been paid, may rescind the contract and sue in *assumpsit* for the amount paid: *Stow v. Stevens*, 7 Vt. 27; 29 Am. Dec. 139; *Smith v. Lamb*, 26 Ill. 396; 79 Am. Dec. 381. A purchaser desiring to rescind a contract need only show the inability of the vendor to perform it, and need not show tender of the purchase-money on his part: *Runkle v. Johnson*, 30 Ill. 328; 83 Am. Dec. 191. The vendee is entitled to the return of the purchase-money, where the rescission is at the instance of the vendee, and on account of the vendor's fault: 1 Rob. (Va.) 12; 39 Am. Dec. 262.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

**NATIONAL PARK BANK OF NEW YORK v. SEA-
BOARD BANK.**

[114 NEW YORK, 28]

TITLE TO COMMERCIAL PAPER RECEIVED FOR COLLECTION BY BANK, and forwarded to its correspondent in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted upon the general account in anticipation of collections. Title passes only by a contract to that effect, either expressly proved or inferred from an unequivocal course of dealing.

WHERE BANK ON WHICH RAISED DRAFT IS DRAWN PAYS IT through mistake, upon its presentation to it by a correspondent bank, as agent, to which it is forwarded for collection, the collecting bank cannot be compelled to repay if it has paid over to its principal before notice of the mistake.

PAYMENT MADE UPON GENERAL ACCOUNT WITHOUT DIRECTION AS TO ITS APPLICATION is applied by the law to the oldest items.

ACTION to recover the difference between the amount of an altered draft and that of the genuine. On July 7, 1885, the First National Bank of Wallingford, Connecticut, drew on the plaintiff a draft for eight dollars, payable to the order of one Frank Saxton. Between that date and the 15th of July, 1885, this draft was raised to eighteen hundred dollars, and on the last-named day said Saxton indorsed it in blank and presented it to the Eldred Bank of Eldred, Pennsylvania, requesting it to collect the same for him. The Eldred Bank received the draft for collection only, and gave a receipt to that effect. It then indorsed it to the order of the defendant's cashier "for collection for account of the Eldred Bank," and forwarded it

to the defendant, its New York correspondent, which received it on the 16th of July, 1885, and forthwith notified the Eldred Bank by mail that it had been received and placed to its credit. On the next day, the defendant presented it, through the New York clearing-house, to the plaintiff, which, through a mistake of fact, paid it as a draft for eighteen hundred dollars. The change in the draft was not discovered by the banks until about the 15th of August, 1885, and they all acted in good faith in the premises. It was the custom of the defendant to immediately notify the Eldred Bank if anything was found to be wrong with any of its checks or drafts. The Eldred Bank, on the 25th of July, 1885, paid over the proceeds of the draft, less its charges for collection, to Saxton, assuming that everything was all right, since it had heard nothing to the contrary. According to the established course of business between the defendant and the Eldred Bank, the former did not become responsible for said draft, forwarded to it for collection, but "was reimbursed by said Eldred Bank in case of the non-payment of any such draft, . . . if the defendant had made any credits, payments, or remittances in anticipation of the collection of the same." On receiving the draft, the defendant credited its amount to the Eldred Bank in the only account that it kept with that bank. This account was balanced on the 21st of July, 1885, and the balance was carried to the credit of the same account, which remained open until after the 15th of August, 1885, but by that time the aggregate of the debits therein entered by the defendant to the Eldred Bank since the last balancing thereof, including the balance then existing in favor of the Eldred Bank, exceeded the aggregate of the credits by considerably more than the sum of eighteen hundred dollars, with interest thereon from July 17, 1885. On the 15th of August, 1885, the plaintiff first learned that the draft had been altered. It then notified the defendant of the fact, and requested it to repay the difference between said sums, with interest. The defendant refused to do so, because it had already paid over the money to the Eldred Bank, which in turn had paid it to Saxton. At this time the balance to the credit of the Eldred Bank on the books of the defendant exceeded the amount of said draft, but said balance arose wholly from transactions subsequent to the date when said draft was paid. The plaintiff then brought this action. The justice who tried the cause without a jury found the foregoing facts, and also found specially "that said

sum of eighteen hundred dollars, and all other sums of money in the possession of or under the control of the defendant on July 17, 1885, and on July 25, 1885, belonging to or to the credit of said Eldred Bank, had been, prior to August 15, 1885, the date of the aforesaid notice, paid over by the defendant to said Eldred Bank; that the defendant never had any title, ownership, interest, or property in or to said check or draft, or any part thereof, and never assumed any title, ownership, interest, or property in the same." And he found as a conclusion of law that the complaint should be dismissed upon the merits. The general term affirmed the judgment entered upon this decision, and the plaintiff appealed.

Francis C. Barlow, for the appellant.

Alfred Taylor, for the respondent.

VANN, J. When the draft in question was paid by the plaintiff under a mistake of fact, the defendant either owned it or simply held it for collection as the agent of the Eldred Bank. If the defendant had then owned the draft, it would have become liable, upon discovery of the facts, to refund the amount mispaid, provided its condition had not in the mean time changed so that this would be unjust: *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *White v. Continental Nat. Bank*, 64 N. Y. 316; 21 Am. Rep. 612. If, however, the defendant did not then own the draft, but merely presented it for payment as the agent of another bank, it could not be required to repay, provided it had paid over to its principal before notice of the mistake: *La Farge v. Kneeland*, 7 Cow. 460; *Mowatt v. McLelan*, 1 Wend. 173; *Herrick v. Gallagher*, 60 Barb. 566; Story on Agency, sec. 300.

The plaintiff claimed that the entry made by the defendant on its books to the credit of the Eldred Bank, upon the receipt of the draft, proved that it belonged to the defendant, while the defendant claimed that the restrictive indorsement of the draft by the Eldred Bank prevented any change of title, and simply created an agency for collection. A question of fact thus arose as to the intention of the parties to the transaction, to be determined by considering their words and acts, their course of business, and all of the surrounding circumstances. We think that the decision of this question in favor of the defendant by the trial court, acting in the place

of a jury, is conclusive upon us. Moreover, it seems to be settled that the title to commercial paper received for collection by a bank, and forwarded to its correspondent in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted upon the general account in anticipation of collections: *Dickerson v. Wason*, 47 N. Y. 439; 7 Am. Rep. 455. Title passes only by a contract to that effect, to be either expressly proved or inferred from an unequivocal course of dealing: *Scott v. Ocean Bank*, 23 N. Y. 289.

This would involve in the case at bar an agreement on the part of the defendant to become absolutely responsible to the Eldred Bank for the amount of the draft, whether it was collected or not, without any right to reimbursement for advances: *Scott v. Ocean Bank*, 23 N. Y. 289. This was not the agreement of the parties to the transaction in question, either as found by the trial court or as appears from the undisputed evidence. In the case of *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, relied upon by the plaintiff, the referee found that the owner of a check indorsed it in blank and deposited it in a bank, which received it as a deposit of money, entered the amount as cash to his credit in his pass-book, and returned the book to him. It was held that, under those circumstances, the property in the check passed from the customer and vested in the bank. No other result could follow a transfer absolute in form and in fact by one party and its receipt as cash by the other.

The learned counsel for the plaintiff concedes that an agent who has received money paid by mistake cannot be compelled to repay it where he has paid it over to his principal without notice, but he contends that as the specific proceeds of this draft were not paid over, the rule has no application. The trial court found, and the evidence clearly shows, that the proceeds of the draft, including the entire amount that the Eldred Bank had to its credit with the defendant when the draft was paid, had been drawn out at least two weeks before the alteration of the draft was discovered.

Where a payment is made upon general account, with no direction as to its application, the law applies it to the oldest items. That is, the first debits are to be charged against the first credits, and the debt paid according to priority of time: *Sheppard v. Steele*, 43 N. Y. 52; 3 Am. Rep. 660; *Allen v. Culver*, 3 Denio, 284; *Webb v. Dickinson*, 11 Wend. 63.

In *Allen v. Culver*, 3 Denio, 293, the court said: "In the case of a running account between parties, where there are various items of debit on one side and of credit on the other, occurring at different times, and no special appropriation of payments, constituting the credits, has been made by either party, the successive payments and credits are to be applied in discharge of the items of debit antecedently due in the order of time in which they stand in the account. In other words, each item of payment or credit is applied in extinguishment of the earliest items of debt until it is exhausted."

We think that this rule should be applied to the case under consideration, and that the amount received upon the draft had been paid over by the defendant to the Eldred Bank before it was notified that the draft had been altered.

The judgment appealed from should be affirmed, with costs.

PAYMENT — APPLICATION. — As between individual and partnership debts, the law will apply payments upon the individual debt: *Robie v. Briggs*, 50 Vt. 443; 59 Am. Rep. 737. As between a legal and illegal debt, the law will apply a payment upon the legal debt: *Backman v. Wright*, 27 Vt. 187; 65 Am. Dec. 187. The law will apply payments according to its own idea of justice and equity, when no particular debt of several is referred to: *Pickering v. Day*, 3 Houst. 474; 95 Am. Dec. 291; *Smith v. Loyd*, 11 Leigh, 512; 37 Am. Dec. 621. Payment before maturity will be applied to principal rather than to the interest, or interest and principal, in the absence of any agreement to the contrary: *Starr v. Richmond*, 30 Ill. 276; 83 Am. Dec. 189. In the absence of the application of a payment by the parties, the law appropriates it to extinguish the oldest charge: *McKennis v. Nevius*, 22 Me. 138; 38 Am. Dec. 291; *Miller v. Miller*, 23 Me. 22; 39 Am. Dec. 597; *Parks v. Ingram*, 22 N. H. 283; 55 Am. Dec. 153.

BANKS AND BANKING — PAYMENT OF FORGED CHECKS. — One who pays a forged check does so at his own peril: *First National Bank v. State Bank*, 23 Neb. 769; 3 Am. St. Rep. 294, and note 298; *Hardy v. Chesapeake Bank*, 51 Md. 562; 34 Am. Rep. 325; *Welsh v. German-American Bank*, 73 N. Y. 424; 29 Am. Rep. 175; *Seventh National Bank v. Cook*, 73 Pa. St. 483; 13 Am. Rep. 751, and note 752; *Dodge v. National Exchange Bank*, 20 Ohio St. 234; 5 Am. Rep. 648; *National Bank of America v. Bangs*, 106 Mass. 441; 8 Am. Rep. 349; *Weasser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731; *Vambibber v. Bank of Louisiana*, 14 La. Ann. 481; 74 Am. Dec. 442; *Commercial etc. Bank v. First National Bank*, 30 Md. 11; 96 Am. Dec. 554, and note; *Laborde v. Consolidated Ass'n*, 4 Rob. (La.) 190; 39 Am. Dec. 517, and note. But the drawees of a bill are only held to a knowledge of the signature of their correspondent, while the holder of the bill must know every other fact in respect to it, and for that reason, where a holder of a bill, the amount of which had been altered from \$27 to \$2,750, presented it to the drawee, and it was paid, the drawee was entitled to recover of the holder on discovering the mistake: *White v. Continental National Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *National Bank of Commerce v. National etc. Ass'n of New York*, 55 N. Y. 211; 14 Am. Rep. 232.

BANKS AND BANKING — TWO BANKS. — Where a bank delivers a draft to another bank to pay a creditor, the relation between the two banks is simply that of principal and agent until the creditor assents to the transaction and acts in accordance therewith: *Brockmeyer v. Washington National Bank*, 40 Kan. 376.

CONNOLLY v. KNICKERBOCKER ICE COMPANY.

[114 NEW YORK, 104.]

QUESTION OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IS FOR CONSIDERATION OF JURY, where he, an infant seven years of age, was, at the time of the accident, standing, by the invitation of the conductor, on the platform of a street-car, with which the defendant's wagon, which was being driven at a rapid rate, came into collision, causing the injury complained of, and the evidence shows that plaintiff did not see the wagon before the collision, and did not look to see if any wagon was coming.

FACT THAT PASSENGER ON STREET-CAR STANDS ON OUTER PLATFORM when there is opportunity to take a seat in the car may, in an action against the railroad company to recover damages as for its negligence, under ordinary circumstances, constitute a defense; but it is not so in an action against another party to recover damages for negligence causing injury to the passenger, because the defendant in such case cannot assert as a defense the mere duty of the passenger in his relation as such to the railroad company.

MINOR CHILD'S BEING UPON PLATFORM OF STREET-CAR IN VIOLATION OF CITY ORDINANCE, while it may be proved as a fact for the consideration of the jury, does not for all purposes necessarily establish negligence on his part.

ACTION to recover damages for personal injuries. The opinion states the case.

Alfred E. Mudge, for the appellant.

A. J. Skinner, for the respondent.

BRADLEY, J. This action was brought to recover damages resulting from personal injuries suffered by the plaintiff, alleged to have been occasioned by the negligence of the defendant. The injury was caused by a collision on Court Street, in the city of Brooklyn, between a street-car and the ice-wagon of the defendant. The wagon was going one way and the car the other, and as the car was turning from that street into another street, a wheel of the wagon came in collision with the rear end of the car, and the plaintiff was thrown from the side platform near that end of the car on which he was standing. The question of negligence of the defendant was, perhaps, a close one, but the evidence seems to have been such as to permit that imputation, and required the submis-

sion of such question to the jury as one of fact. Both the wagon and the car were properly in the street, and the duty was with the driver of each to use reasonable care against injury to others. In this instance they approached each other at or near the junction of Court and Nelson streets, and the car was on the curve, proceeding to turn into the latter street, when it was struck by the wagon.

The main evidence of negligence of the defendant was that relating to the speed it was being driven. There is evidence tending to prove that it was going rapidly, and continued to do so until the collision occurred. It is, however, said, with the support of evidence tending to prove the fact, that if the car had continued in Court Street there would have been no collision; that the driver was not aware of the purpose to turn into the other street until both reached Nelson Street, and that then it was too late for the driver of the wagon to avoid the collision caused by the swinging of the rear end of the car into the line of the wheels on one side of the wagon in making the turn, and that the driver did what he then could to get the wagon out of the way of the car. Upon evidence given on the part of the defendant, if taken by the jury as a full and correct representation of the situation, they could not properly have charged the defendant with liability. But the jury were permitted, upon evidence given upon the trial, to find that when the movement was first made to turn the car, the defendant's driver, influenced by reasonable care, and in view of the situation, and exercising it, may and should have slackened the speed of the wagon, and by doing so the collision and the consequences resulting from it would have been avoided. And that, while the driver did not know or suppose until the car reached the intersecting street that it would be turned into it, the switch there would, if observed, have shown the opportunity to do so. The evidence on the part of the plaintiff, and the inferences fairly derivable from it, permitted the conclusion that the collision was caused by the negligence of the defendant's servant who was driving the wagon. The further question is, whether it appeared that the plaintiff exercised the care required of him. The burden was with him to make it so appear by evidence. He was then of the age of seven years, and was chargeable with the duty of exercising such degree of care as could reasonably be expected of one of his age, which, in view of all the circumstances, was properly for the consideration of the jury upon the question of contributory

negligence: *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Byrne v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 620; *Thurber v. H. B. M. & F. R. R. Co.*, 60 Id. 326.

There was some conflict of evidence in relation to the circumstances under which the plaintiff got onto the car, but the finding was permitted by it, that the plaintiff, as he had done on one or more occasions before, appeared at the switch, turned it to enable the car to go from Court into Nelson Street; that he did so by the request of the conductor, who told him to do it and get on the car; that the plaintiff did so with a view to obtaining from the conductor a penny, and that while he stood on the platform waiting for it, the collision occurred which caused the injury. The plaintiff says he did not see the wagon, nor did he look to see if any wagon was coming. The car was then turning on its way into Nelson Street. He took no observation to see whether there was any danger to come from collision of the car with anything passing on the street. As matter of law, it cannot be said that he was required to apprehend that there might be an occurrence of that character, or that he might be subject to such a cause of danger. So that the failure to look for approaching vehicles on the street was not necessarily negligence on his part. The fact that a passenger on a street-car stands upon the outer platform, when there is opportunity to take a seat in the car, might, in an action against the railroad company to recover damages, as for its negligence, under ordinary circumstances, constitute a defense: *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135; 93 Am. Dec. 495. But that may not be so when the action is against another party, as the defendant, in such case, cannot assert as a defense the mere duty of the passenger in his relation as such to the railroad company. We think the question of contributory negligence of the plaintiff was for the jury. And they were permitted, upon the evidence, to find that the negligence of the defendant was the sole cause of the injury. The motion for nonsuit was, therefore, properly denied, unless, as suggested by the defendant's counsel, the plaintiff was chargeable with such negligence by force of the statute, which provides that no minor child, not being a passenger, shall be allowed upon the platform or steps of any street-car, and that it shall be the duty of constables, etc., to arrest any child violating such provision, who, upon conviction, shall be punished by fine not exceeding five dollars for the offense: Laws of 1880, c. 585. While the violation

of such statute may be proved as a fact for consideration by the jury, such violation does not, for all purposes, necessarily establish negligence: *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488. The getting upon the car was not the immediate cause of the plaintiff's injury, and assuming that the plaintiff violated the statute, he was not, for that reason, denied the right to assert the defendant's negligence as the cause of the injury, and charge it with liability as the consequence: *Carroll v. Staten Island R. R. Co.*, 58 Id. 126; 17 Am. Rep. 221; *Platz v. City of Cohoes*, 89 N. Y. 220; 42 Am. Rep. 286. In this case, the finding was warranted that the plaintiff got onto the car, not as a passenger, but temporarily, by the invitation of the conductor.

None of the defendant's exceptions were well taken.

The judgment must be affirmed.

CONTRIBUTORY NEGLIGENCE—QUESTION FOR THE JURY.—The question of negligence, as well as that of contributory negligence, is ordinarily one of fact for the jury: *Killian v. Augusta etc. R. R. Co.*, 79 Ga. 234; *ante*, p. 410, and note; *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; *ante*, p. 87, and note; *Village of J. v. Chapman*, 127 Ill. 438; *ante*, p. 136, and note; *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387, and note; *Kelly v. Inhabitants of Blackstone*, 147 Mass. 448; 9 Am. St. Rep. 730; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813, with the cases there cited; *City R'y Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798, and note 801, 802; *Delaware etc. R. R. Co. v. Oadwa*, 120 Pa. St. 559; 6 Am. St. Rep. 730, and note 732; *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151, and note 162; *Selinas v. Vermont etc. Soc.*, 60 Vt. 249; 6 Am. St. Rep. 114, and note 117; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note 174; *Wallace v. Western N. C. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346, and note 349; *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354, and note 363.

CONTRIBUTORY NEGLIGENCE OF A CHILD.—It cannot be held that the same degree of care should be exacted of a child as of an adult, in order to avoid the imputation of contributory negligence: *Houston etc. R'y Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615, and note; *Moebus v. Herrmann*, 108 N. Y. 349; 2 Am. St. Rep. 440.

NEGLIGENCE—RECOVERY BY ONE WHO VIOLATES THE LAW.—Plaintiff is not necessarily precluded from recovering for injuries received through defendant's negligence because of the fact that, at the time such injuries were received, plaintiff was violating the law: *Davidson v. City of Portland*, 69 Me. 116; 31 Am. Rep. 253; *Platz v. City of Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286; *Schmid v. Humphrey*, 48 Iowa, 652; 30 Am. Rep. 414; *Bukhsin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670; *White v. Lang*, 128 Mass. 598; 35 Am. Rep. 402; *Wallace v. Merrimuck etc. Exp. Co.*, 134 Mass. 96; 45 Am. Rep. 301; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576; *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366, and note 367; *O'Connell v. City of Lewiston*, 65 Me. 34; 20 Am. Rep. 673; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221; *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534, and note 544.

SCHMITTLER v. SIMON.

[114 NEW YORK, 173.]

ORAL EVIDENCE OF CIRCUMSTANCES ATTENDING EXECUTION OF INSTRUMENT IS ADMISSIBLE, as between the parties, to aid in the interpretation of words used therein, where such words, in their application to the instrument of which they are a part, are not entirely intelligible. Where, therefore, a draft was drawn upon the defendant, with the word "executor" after his name, payable at a time specified, with direction to charge the same against the drawer, and of his mother's estate, and the defendant accepted it, adding the word "executor" to his name, in an action by the plaintiff, who was the wife and indorsee of the payee, against the defendant, who was the executor of the will of the drawer's mother, evidence is admissible, on the part of the defendant, to show that when the draft was drawn it was understood by the plaintiff and her husband that it should be taken upon the security of the drawer's interest in the estate of his mother; that it was then understood between the drawer, payee, and the plaintiff that it was to be paid out of such interest, and that the defendant then stated, in their presence, that he would accept in his capacity as executor, to be paid only out of the drawer's interest in the estate. This evidence is competent as bearing upon the understanding of the relation and the character of liability which the defendant assumed by his acceptance of the draft.

ACTION against the defendant as acceptor of the following draft:—

"NEW YORK, February 26, 1877.

"Mr. Adam Simon, executor, will please pay to Johannes Schmittler, or his order, on the first day of July, which will be the year 1879, the sum of nine hundred doll., with seven per cent interest, to be paid, besides the amount, yearly, July month, and charge the amount against me and of my mother's estate.

WM. J. SCHAREN."

Across the face was written: "Accept, Adam Simon, executor." And it was indorsed: "Pay to the order of Mary Schmittler the amount of note. Johannes Schmittler." Other facts appear from the opinion.

Charles C. Smith, for the appellant.

Winchester Hall, for the respondent.

BRADLEY, J. Upon the review of a former trial, where the question presented had relation only to the legal import of the terms of the instrument in question, it was held that it was a bill of exchange, and that the defendant was, upon his acceptance, personally liable to the plaintiff as indorsee of the paper: 101 N. Y. 554; 54 Am. Rep. 737. This is the review of the succeeding trial, and the admissibility of evidence offered by

the defendant is now the subject of inquiry. The defendant was executor of the will of Regina Scharen, deceased. She was the mother of the drawer of the draft. There is some evidence tending to prove that the draft was taken by the payee for the plaintiff, who was his wife, or with a view to transfer it to her. The defendant offered evidence tending to prove that it was understood by the plaintiff and her husband that the draft should be taken upon the security of the drawer's interest in the estate of his mother; that when the draft was drawn it was understood between the drawer, payee, and the plaintiff that it was to be paid out of such interest in the estate; also, that the defendant then said, in the presence of all those parties, that he would not accept the draft, or become liable upon it personally, and that it was then agreed or said between them that the defendant would accept the draft in his capacity as executor, to be paid only out of the drawer's interest in his mother's estate. This evidence was offered in various forms on inquiry, and, upon objection of plaintiff's counsel, was excluded, and exceptions taken. The general rule is, that when an agreement is reduced to writing, it, as between the parties, is deemed to merge and overcome all prior or contemporaneous negotiations and declarations upon the subject, and that no oral evidence is admissible to vary, explain, or contradict its terms. But it may be that it would have been admissible for the defendant to prove, if he could, that his acceptance was not to take effect as such until a certain event, then in the future, and that when the payee and the plaintiff received it, they were advised of an arrangement to that effect: *Seymour v. Cowing*, 1 Keyes, 532; 4 Abb. App. 200; *Benton v. Martin*, 52 N. Y. 570; *Reynolds v. Robinson*, 110 Id. 654; *Wilson v. Powers*, 131 Mass. 539; *Wallis v. Littell*, 11 Com. B., N. S., 369. In this connection, reference may also be made to the proposition that the purpose for which a written contract is made may rest in a collateral oral arrangement, which may be shown to the effect that the design of it is different from that which its terms alone may indicate: *Grierson v. Mason*, 60 N. Y. 394; *Juilliard v. Chaffee*, 92 Id. 529; *Chapin v. Dobson*, 78 Id. 74; 34 Am. Rep. 512. These propositions are not applicable when the conclusion is required that the writing contains the final consummation of the entire agreement between the parties. While the evidence so offered may bear the construction that there was an understanding between the parties to the draft that the liability of the defendant on the acceptance was

dependent upon an ascertained interest of the drawer in the estate of his mother, and in that event, to be incurred to the extent only of such interest, not exceeding the amount of the draft, we think such evidence cannot fairly be construed as tending to prove a collateral agreement suspending the inception or operation of the acceptance until some future event, or as tending to show that it was made for a purpose independent of the import of its terms, within the rule before mentioned. And therefore it is unnecessary to consider the question of the applicability of those propositions to negotiable paper. The consideration of a contract, in whatever form it may have been, may, as between the immediate parties to it, be the subject of inquiry. And in an action by the payee upon a note made by an executor or administrator on account of a debt which his testator or intestate left unpaid, such fact, and that the assets of the estate were insufficient to pay the note, may be shown as a defense, wholly or partially, as it may appear that there was an entire or partial want of assets to pay the debt represented by the note: *Bank of Troy v. Topping*, 9 Wend. 273; 18 Id. 557.

The question in such case is one of consideration for the promise evidenced by the note supposed to have been founded wholly upon the assets of the estate which the maker represented. While the maker and payee of a promissory note and the drawer and acceptor of a bill of exchange are immediate parties to the paper, that relation of privity does not exist between the payee and acceptor; and as between them alone, the want of consideration is no defense; but the acceptor, for the purpose of his defense in that respect, must go further, and prove that there was no consideration as between the drawer and payee. There was no purpose indicated in the evidence offered to do that, and therefore it does not seem to have been competent for that purpose. The question now is, whether the evidence so offered was admissible for any purpose. On the former review, in referring to the contention that the draft was drawn upon a specific fund, the court said: "Considering the question, as we are compelled to do, from the language of the instrument alone, we are unable to agree to the interpretation that the draft was payable only from a particular fund"; and added: "While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it [the fund] is mentioned only as a source of reimbursement"; and "if the language of the

paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him; but as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and we think should be held to the contract which other parties were authorized, by his acceptance, to infer he intended to make." It does not appear what view the court may have taken of the admissibility of evidence of the fact, and of the fact itself, if it had then appeared that the payee and the plaintiff, when they received the draft, had been advised that it was drawn and accepted to be paid out of the drawer's interest represented by the defendant as executor. The question there was solely one of construction of the instrument as represented by its terms. And all that the court there necessarily determined was, that it did not appear by the terms of the draft that it was drawn upon a particular fund. That character would not be given to the draft upon doubtful construction as against the plaintiff, who was presumed to be a *bona fide* holder of it. The fact that the drawee was in the draft designated as executor, and that he added the like designation to his name subscribed to the acceptance would not of itself import any other than a personal relation of the defendant to the instrument, as the word "executor" annexed to his name would presumptively be treated as merely descriptive of the person. But it might be given some substantial significance by other provisions, if those were such as to require it in the instrument, and in a proper case this might be aided by extrinsic facts. The defendant, as executor, represented whatever interest the drawer of the draft had in the estate of Mrs. Scharen, deceased, and such interest must be obtained by him or whomsoever should become entitled to it through the executor. That situation would have rendered a draft upon the latter for that purpose, and his acceptance, so qualified, legitimate. In that view it would seem that if the understanding of the parties to the draft, and the holder of it, was such, the *prima facie* import of the word "executor" might be overcome by evidence to the effect that it was used to qualify the liability of the defendant, and to show that it was assumed in his representative capacity only. This rule is applicable to other relations of a representative character, in like manner indicated, although the contract does not, in its terms, purport to have been made by or for the principal otherwise than by way of designation of the

representative character of the person making it. The like presumption exists in that as in this case, that the added designation is *descriptio personæ*, and the right to show the fact to be otherwise is dependent upon the knowledge of the other party to the contract that such was the purpose when it was made: *Brockway v. Allen*, 17 Wend. 40; *Paddock v. Brown*, 6 Hill, 530; *Hicks v. Hinde*, 9 Barb. 528; *Horton v. Garrison*, 23 Id. 176; *Auburn City Bank v. Leonard*, 40 Id. 186; *Bowne v. Douglass*, 38 Id. 312; *Lee v. M. E. Church etc.*, 52 Id. 116; *Babcock v. Beman*, 11 N. Y. 200.

In such case it is open to explanation by evidence to show that the purpose, as understood by the parties to the transaction, was that the party so executing the contract intended to assume no personal liability: *Hood v. Hallenbeck*, 7 Hun, 362-365, and cases before cited. And when aided by such evidence, the fact that a payee in a note who indorses it, and a drawee in a draft who accepts it, are, as well as in the indorsement and acceptance, in that manner designated, may be entitled to some significance: *Bowne v. Douglass*, *supra*; *Babcock v. Beman*, 11 N. Y. 200. The distinction between the cases referred to and the present one is, that there was there a principal whose representative made the contract, which was a fact essential to the application of such rule upon the question of liability, while here the defendant, as executor, had no principal party to charge with liability upon his contract, and could represent no person as such. But he had duties to perform, as executor, in relation to the estate of his testatrix, amongst which was the duty to render his account, and pay over, for the benefit of persons interested, such shares as they were entitled to from the estate; and if it was intended by the draft and acceptance, and such construction can, by aid of extrinsic facts, be allowed, that the defendant should be charged in the line of his representative duty merely, it would follow that he would be required to pay to the holder of the instrument to the extent of the sum mentioned from the interest of the drawer in the estate, if it were sufficient for the purpose. That would be a proper liability of the defendant as such trustee, and the drawer and payee might depend upon the existence of that fund for payment. In the case of agency there is no fund but a principal to charge. It is difficult to see any well-founded distinction for the application, in the two classes of cases, of the rule, which permits the introduction of evidence to show the intention and purpose in that respect of

the parties to and interested in the transaction who were advised of such purpose when they assumed their relation to the contract.

In *Pinney v. Johnson*, 8 Wend. 500, this question did not arise. There the administrators had been charged by judgment upon their bond to a third party on account of a debt due from their intestate, and which they alleged as a liability of the estate, and a deficiency of assets by way of defense. The replication charged that the defendants had sufficient assets to pay the judgment and the plaintiff's claim, etc. The question arose upon the demurrer to the replication. The plaintiff had judgment, with leave to the defendant to rejoin. The court held that the judgment upon the bond of the administrators did not bind the estate, although the bond purported to have been made by them in their representative capacity. It is evident if they had any defense within the case of *Bank of Troy v. Topping*, *supra*, it did not survive the recovery of the judgment upon it. If the presumption arising out of the *prima facie* relation assumed by the defendant to the draft in question prevail, he must be personally liable within the doctrine of the case last cited. We are not prepared to say that in the present case the defense will be aided by the words "against me and of my mother's estate" in the draft, or any construction which may be put upon them. There is certainly some obscurity as to the purpose for which they were used, and they may be said to present some ambiguity. For the purpose of the construction of the instrument, no words can be added or taken from its provisions, but where the words used, in their application to an instrument of which they are a part, are not entirely intelligible, oral evidence of the circumstances attending its execution may, as between the parties, be admissible to aid in the interpretation, in its application, of the language so used: *Fish v. Hubbard*, 21 Wend. 651-662; *Field v. Munson*, 47 N. Y. 221.

For the reasons before given, we think the rejected evidence referred to should have been received as bearing upon the understanding of the relation and the character of liability the defendant assumed by his acceptance of the draft. It is deemed admissible, in view of the designation which was given to the defendant in the draft, and in his acceptance of it, and by what appears on the face of the draft: *Hicks v. Hinde*, 9 Barb. 531; *Laflin etc. Co. v. Sinsheimer*, 48 Md. 411; 30 Am. Rep. 472.

This view is taken upon the assumption, as the offered evidence indicated, that the plaintiff and her husband were advised, when they received the draft, of the facts embraced in the offers of proof; otherwise the draft, as to the plaintiff, must, as on the former review, be treated as a negotiable bill of exchange, and no other interpretation can, by evidence of extrinsic circumstances, be given, nor, for that purpose, will the evidence be admissible. The fact that the draft was payable at a particular time and place may be a circumstance entitled to consideration upon the merits; but they do not have the conclusive effect claimed for them by the plaintiff's counsel; and the same may be said in respect to the payments heretofore made by the defendant of interest upon the amount of the draft. We do not consider the effect of the acceptance by way of admission of assets in his hands belonging to the estate, or the force to which it may be entitled as such.

The only question now here arises upon exceptions to the exclusion of evidence, which seems to have been well taken, and for that reason the judgment should be reversed, and a new trial granted, costs to abide the result.

PAROL TESTIMONY TO VARY, explain, or otherwise add to or change instruments of writing: See extended note to *Sullivan v. Lear*, ante, p. 393; compare *Smith v. Clews*, 114 N. Y. 190; *infra*, and note.

SMITH v. CLEWS.

[114 NEW YORK, 190.]

EVIDENCE IS ADMISSIBLE TO EXPLAIN MEANING OF TERMS USED IN PARTICULAR TRADE, when their meaning is material to construe the contract, and the rule extends to forms of expression as well as to single words.

EVIDENCE OF USAGE IS ADMISSIBLE TO APPLY WRITTEN CONTRACT TO SUBJECT-MATTER of the action, to explain expressions used in a particular sense by particular persons as to particular subjects, and to give effect to language in a contract as it was understood by those who made it.

MERE POSSESSION OF PROPERTY CONFERS NO POWER TO SELL IT, and an unauthorized sale, although for a valuable consideration, and to one having no notice that another is the true owner, vests no higher title in the vendee than was possessed by his vendor.

WORDS "ON APPROVAL" HAVE WELL-UNDERSTOOD MEANING IN DIAMOND TRADE, and as ordinarily interpreted, are neither inconsistent with an authority "to show" or an obligation "to return on demand."

ACTION to recover personal property. The opinion states the case.

Ezek Cowen, for the appellants.

Albert A. Abbott, for the respondent.

BROWN, J. This action was brought to recover the possession of two diamonds, with their settings, constituting what is called, in the evidence, a pair of diamond ear-knobs.

The plaintiffs are dealers in diamonds, having their place of business at No. 14 John Street, in New York City. On the eleventh day of April, 1879, Borden W. Plumb, who was a diamond-broker, introduced to Mr. Alfred H. Smith, one of the plaintiffs, one Elijah Miers, telling Smith that Miers thought that if he saw a pair of ear-knobs that suited him, he could sell them to Mr. Clews, and that he had brought him to the plaintiffs' store that he might see the assortment. Miers selected a pair which he said he thought would suit Mr. Clews, and it was then arranged that Smith should send them to him on the following day by Mr. Plumb.

Miers had, on two previous occasions, sold stones to Mr. Clews. On the first occasion he sold a pair for \$300, which, proving unsatisfactory, were returned and another pair substituted in their place, of the value of \$450.

On the day following the conversation at the store, the diamonds were delivered to Plumb, who delivered them to Miers, taking from him at the time of the delivery a receipt, of which the following is a copy:—

“NEW YORK, April 12, 1879.

“Received from Alfred H. Smith & Co., by their representative, B. W. Plumb, a pair of single-stone diamond ear-knobs, ten and one eighth carats, of the value of fourteen hundred dollars, ‘on approval,’ to show to my customers. Said knobs to be returned to said A. H. Smith & Co. on demand.

[Signed]

“E. MIERS.”

Miers soon after sold the diamonds to Clews for \$1,100, taking back in part payment the second pair that he had sold him for \$450, and receiving credit on Clews's book for \$650, of which \$550 was paid out by Clews for Miers's account, but for what purpose does not clearly appear from the evidence. Plaintiffs demanded the diamonds from Miers and from Clews, and this action was brought to recover their possession.

The case has been twice tried. On the first trial, the plaintiffs had judgment, which was reversed in this court: 105 N. Y. 286. On the second trial the complaint was dismissed,

and the general term having affirmed the judgment entered on such dismissal, plaintiffs appealed to this court.

After proving substantially the facts I have stated, the plaintiffs called as a witness Chester Billings, who, having testified that he had been an importer and dealer in diamonds in the city of New York for thirty-six years, was asked whether there was a peculiar meaning given in the diamond trade to the words "on approval." This question was excluded on defendant's objection, and plaintiffs excepted. Plaintiffs then offered to prove by Billings and other witnesses that the words "on approval" mentioned in the receipt had a recognized meaning in the diamond trade, and were understood not to confer a power to sell, but authority merely to show diamonds to a customer and report to the owner, and that this meaning was well known to plaintiffs and to Plumb and Miers. This evidence was excluded on defendant's objection, to which plaintiffs excepted. Evidence is always admissible to explain the meaning of terms used in any particular trade, when their meaning is material to construe the contract, and the rule extends to forms of expression as well as to single words. Evidence of usage is also admissible to apply a written contract to the subject-matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects, to give effect to language in a contract as it was understood by those who made it: *Walls v. Bailey*, 49 N. Y. 470; 10 Am. Rep. 407; *Silberman v. Clark*, 96 N. Y. 524; *Boorman v. Johnston*, 12 Wend. 573; 27 Am. Dec. 158; *Dana v. Fiedler*, 12 N. Y. 46; 62 Am. Dec. 130; *Bissel v. Campbell*, 54 N. Y. 357; *Hinton v. Locke*, 5 Hill, 437; *Newhall v. Appleton*, decided at this term of the court, opinion by Parker, J. The case shows that this evidence was excluded by the trial court because the plaintiffs did not bring it home to Mr. Clews. Obviously, Clews's knowledge of the custom had nothing to do with the question. No man can be divested of his property without his own consent, and consequently even an honest purchaser under a defective title cannot hold against the true owner. That "no one can transfer to another a better title than he has himself is a maxim," says Chancellor Kent, "alike of the common and civil law, and a sale *ex vi termini* imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor": 2 Kent's Com. 324, and cases cited. The rightful owner may be estopped by his own acts from asserting his title. If he has invested another with

the usual evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing on the faith of such apparent ownership: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341. But mere possession has never been held to confer a power to sell, and an unauthorized sale, although for a valuable consideration, and to one having no notice that another is the true owner, vests no higher title in the vendee than was possessed by his vendor: *Covill v. Hill*, 4 Denio, 323. Clews's title to the diamonds, therefore, depended wholly on Miers's authority to sell, and he was bound by such limitation as the owner had placed upon Miers's possession, and unless authority to sell existed, Clews, although acting in entire good faith, obtained no title to the stones. It was, therefore, of no consequence whether or not Clews knew of the custom of the trade. The inquiry was, Did Miers know of it? and had he contracted with reference to it? The offer was to show that the term "on approval" had a well-understood meaning in the diamond trade, and as Miers was a dealer and broker in diamonds, if it had appeared that the term had a well-understood meaning in the diamond business, he might fairly be presumed to have been acquainted with the meaning of the expression, and to have contracted in reference to such meaning. But the offer went further, and proposed to show actual knowledge in Miers of the meaning of this term; and if such had been the fact, it would not have lain with him to have denied the well-understood meaning of an expression used by himself in the agreement by which he acquired possession of the property, nor could he escape the effect of the application of such meaning to the subject-matter of the contract. This evidence was, therefore, admissible, and the exclusion error, for which there must be a new trial, unless the contract between the parties expressed the power to sell in language so well understood that there is no ambiguity, and no room, under the rules of law for parol testimony, to aid in its interpretation.

On the former appeal of this case the court construed the contract, in the light of the evidence then before it, to confer on Miers a power of sale, and if the same evidence was now before us we should feel constrained to follow that decision. It then appeared that plaintiffs, prior to the transaction in question, knew Miers to be a dealer in diamonds, and that the stones which on two former occasions he had sold to Clews

had been obtained from plaintiffs through Plumb, who was their agent.

The court emphasized these facts, saying: "The plaintiffs were dealers in diamonds, and they knew Miers, and that he was engaged in the business of a diamond-dealer. They had, on two former occasions, intrusted, through their agent, diamonds to Miers, who had sold them, and accounted for the proceeds of the sale without any fault being found, so far as appears, on account of any lack of authority to sell. Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds and show them to the customer, and if approved of by the customer, sell them to him? It can mean nothing else than an authority to sell the stones to the customer, if they met his approval."

These facts do not appear in the case presented to us. On the contrary, it appears that Miers was personally unknown to plaintiffs until introduced by Plumb on April 11th, and there is not the slightest evidence to justify the inference that the other stones sold to Clews had been obtained from plaintiffs or from Plumb. We have, therefore, no other dealings between the parties to aid us in interpreting the contract, and are confined to the single transaction out of which this action has grown. Upon the face of the contract it does not import an authority to sell. If the words "on approval" are stricken from the paper, it would appear to be a complete agreement, of plain meaning, in which the authority given is "to show" the diamonds, and the obligation is absolute "to return on demand." Such expressions are wholly inconsistent with an authority "to sell," and its meaning could not be plainer if the parties had inserted after the words "to show" the words "but not to sell." The words "on approval," as ordinarily interpreted, are neither inconsistent with an authority "to show" or an obligation "to return on demand." We must, however, presume that the parties intended some meaning by their use; and as the meaning does not appear from the context, we have a case where parol evidence is admissible to enlighten the court, and to show the intent of the parties to the contract: *White v. Hoyt*, 73 N. Y. 512. It is unfortunate that the case should not now present the same facts that were before the court on the first appeal. Why it does not we are not informed. But we cannot speculate as to what may be

the real facts, and must confine our decision to the case now before us.

We think the court erred in excluding the evidence offered, and the judgment should be reversed, and a new trial granted, with costs to abide the event.

CUSTOM AND USAGE. — Custom and usage cannot be given in evidence to contravene a rule of law, or to alter or contradict the express or implied terms of a contract free from ambiguity: *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771, and note 775; *Susquehanna F. Co. v. White*, 66 Md. 444; 59 Am. Rep. 186; *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463; *Randall v. Smith*, 63 Me. 463; 18 Am. Rep. 200, and note 204; *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; *Royers v. Woodruff*, 23 Ohio St. 632; 13 Am. Rep. 276; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Southwestern F. etc. Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255; *Boon v. Steamboat Belfast*, 40 Ala. 184; 88 Am. Dec. 761; *Boardman v. Spooner*, 13 Allen, 353; 90 Am. Dec. 196; *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145; *Dickinson v. Gay*, 7 Allen, 29; 83 Am. Dec. 656; *Deshler v. Beers*, 32 Ill. 368; 83 Am. Dec. 274; *Ripley v. Crooker*, 47 Me. 370; 74 Am. Dec. 491; *Atwood v. Reliance T. Co.*, 9 Watts, 87; 34 Am. Dec. 503; *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321; *Governor v. Withers*, 5 Gratt. 24; 50 Am. Dec. 95; *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611; *Sweet v. Jenkins*, 1 R. I. 147; 36 Am. Dec. 242; *Harris v. Carson*, 7 Leigh, 632; 30 Am. Dec. 510; *Kendall v. Russell*, 5 Dana, 501; 30 Am. Dec. 696; *Cortelyou v. Van Brundt*, 2 Johns. 357; 3 Am. Dec. 439; *Gano v. Palo Pinto Co.*, 71 Tex. 99. But evidence of custom and usage may be admissible to explain the terms of a written instrument, to make certain technical expressions used in a contract, or to ascertain the intention of parties entering into an agreement in writing, especially when such custom or usage is peculiar to some particular business: *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; *Walls v. Bailey*, 49 N. Y. 464; 10 Am. Rep. 407; *McMasters v. Pennsylvania R. R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264; *Morning Star v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211; *Mooney v. Howard Ins. Co.*, 138 Mass. 375; 52 Am. Rep. 277; *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107; 100 Am. Dec. 621, and note; *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374; *Southwestern F. etc. Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255; *Johnson v. Concord R. R. Co.*, 46 N. H. 213; 88 Am. Dec. 200; *Ford v. Tirrell*, 9 Gray, 401; 69 Am. Dec. 297; *Pribble v. Kent*, 10 Ind. 325; 71 Am. Dec. 327; *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478; *Farnsworth v. Chase*, 19 N. H. 534; 51 Am. Dec. 206; *Clark v. Baker*, 11 Met. 186; 45 Am. Dec. 199; *Andrews v. Roach*, 3 Ala. 590; 37 Am. Dec. 718; *Cooper v. Kane*, 19 Wend. 386; 32 Am. Dec. 512; *Knox v. Rives*, 14 Ala. 249; 48 Am. Dec. 97; *Inglebright v. Hammond*, 19 Ohio St. 337; 53 Am. Dec. 430; *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268; *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633; *Foye v. Leighton*, 22 N. H. 75; 53 Am. Dec. 231; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. 136; 20 Am. Dec. 424; *Gordon v. Little*, 8 Serg. & R. 533; 11 Am. Dec. 632; *Middleton v. Heyward*, 2 Nott & McC. 9; 10 Am. Dec. 554; *Boorman v. Jenkins*, 12 Wend. 566; 27 Am. Dec. 158; *Pavey v. Burch*, 3 Mo. 447; 26 Am. Dec. 682; *Coit v. Commercial Ins. Co.*, 7 Johns. 385; 5 Am. Dec. 282; *Farrar v. Stackpole*, 6 Greenl. 154; 19 Am. Dec. 201; *Sampson v. Guzman*, 6 Port. 123; 30 Am. Dec. 578; *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240; *Thompson*

v. *Hamilton*, 12 Pick. 425; 23 Am. Dec. 619; *Barber v. Brace*, 3 Conn. 9; 8 Am. Dec. 149; *Norris v. Insurance Co. of N. A.*, 3 Yeates, 84; 2 Am. Dec. 360; *Exger v. Atlas Ins. Co.*, 14 Pick. 141; 25 Am. Dec. 363; note to *Williams v. McGanhey*, 6 Am. Rep. 678-682. And for the general law upon this subject, see *Lawson* on Usages and Customs, c. 4, 5, with the cases therein discussed and cited.

PAROL EVIDENCE, WHEN ADMISSIBLE TO EXPLAIN A WRITTEN CONTRACT: *Schnittler v. Simon*, 114 N. Y. 176; *ante*, p. 621; *Sullivan v. Lear*, 23 Fla. 463; *ante*, p. 388, and extended note 393-395; *Dana v. Fiedler*, 12 N. Y. 40; 62 Am. Dec. 130, and note 136; *Stoops v. Smith*, 100 Mass. 63; 1 Am. Rep. 85; *Sweat v. Shumway*, 102 Mass. 365; 3 Am. Rep. 471; *Miller v. Stevens*, 100 Mass. 509; 1 Am. Rep. 139; *Keller v. Webb*, 125 Mass. 88; 28 Am. Rep. 209; and compare *Tyson v. Post*, 108 N. Y. 217; 2 Am. St. Rep. 409; *Coleman v. Pike County*, 83 Ala. 326; 3 Am. St. Rep. 746, and note 748, 749, — in which two cases it is held that the rule against allowing oral testimony to contradict a written contract is confined to the parties to such writing.

POSSESSION OF PERSONALTY is only *prima facie* evidence of ownership: *Bergen v. Riggs*, 34 Ill. 170; 85 Am. Dec. 304; *Dick v. Cooper*, 24 Pa. St. 217; 64 Am. Dec. 652; *Wright v. Solomon*, 19 Cal. 64; 79 Am. Dec. 196; *Avery v. Clemons*, 18 Conn. 306; 46 Am. Dec. 323; *Magee v. Scott*, 9 Cush. 148; 55 Am. Dec. 49; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306; *Den v. Webb*, 4 Dev. 290; 25 Am. Dec. 711; so that mere possession is not authority to dispose of personalty: *Spraight v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278; *Moon v. Hawks*, 2 Aiken, 390; 16 Am. Dec. 725.

NATIONAL ULSTER COUNTY BANK v. MADDEN.

[114 NEW YORK, 280.]

ORIGINAL ENTRY MADE BY WITNESS IS ONLY ADMISSIBLE AS AUXILIARY TO HIS EVIDENCE when he is unable to distinctly recollect the fact without the aid of it. The rule which renders such an entry admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which it relates.

MATERIAL ALTERATION OF CHECK AFTER ITS INDORSEMENT, WITHOUT INDORSER'S CONSENT, is presumed to have been so made as to vitiate it as against him, and the burden is upon the party seeking to recover on it to relieve it from the effect of the unauthorized alteration, by showing that it was made by a stranger to the instrument.

ACTION to recover the amount of certain indorsed checks. The opinion states the case.

John J. Linson, for the appellant.

E. S. Wood, for the respondent.

BRADLEY, J. The action was brought to recover the amount of eighteen checks drawn by the defendant, Sarah M. Fowks,

by her attorney, Horatio Fowks, upon the National Bank of Rondout, and payable to the order of the defendant, Madden, and indorsed by the latter. Madden alone defended, and alleged that after the checks were indorsed by him they were altered in respect to the time for payment, so as to make them payable at a future day, without his knowledge or consent. He testified that, when so indorsed by him, no time of payment was expressed in any of them. When they were discounted by the plaintiff, they respectively appeared to be payable at specified times subsequent to their dates. The defendant, Madden, also testified that when he indorsed the several checks, he made a memorandum entry of the dates, amounts, and time when payable of them respectively; and in his examination in chief, in his own behalf, he was permitted, against the objection and exception of the plaintiff's counsel, to read such memoranda to the jury. The main question arises upon the admissibility of those entries in evidence. The rule in this state, prior to the decision in *Merrill v. Ithaca and Owego R. R. Co.*, 16 Wend. 586, 30 Am. Dec. 130, was, that a witness might refer to his memorandum to refresh his memory, and then was permitted to testify to the facts, provided he could do so independently of it upon his recollection. That was the extent of the rule in this respect: *Feeter v. Heath*, 11 Wend. 479; *Lawrence v. Barker*, 5 Id. 301. In the *Merrill* case, the court reviewed the cases, and cited text-books upon the subject, and announced the conclusion that original entries read by a witness, and which he should testify were correctly made, might be read in evidence, though he remembered nothing of the facts represented by them, but that to render such entries admissible, it should appear that "every source of primary evidence had been exhausted." Since then, so far as we have observed, it has uniformly been held admissible for the witness to refer to the original entries in respect to the facts which he is called upon to testify, and if he verifies their correctness, and is unable to recollect such facts, independently of such entries, they may be read in evidence: *Bank of Monroe v. Culver*, 2 Hill, 531; *Cole v. Jessup*, 10 N. Y. 96; *Halsey v. Sinsebaugh*, 15 Id. 485; *Russell v. Hudson River R. R. Co.* 17 Id. 134; *Guy v. Mead*, 22 Id. 462; *Squires v. Abbott*, 61 Id. 530-535; *Howard v. McDonough*, 77 Id. 592; *Peck v. Valentine*, 94 Id. 569; *Mayor etc. v. Second Ave. R. R. Co.*, 102 Id. 572-580; *Brown v. Jones*, 46 Barb. 400; *Meacham v. Pell*, 51 Id. 65; *Kennedy v. O. & S. R. R. Co.*, 67 Id. 170-182.

The general term cited, on this question, *Guy v. Mead, supra*, and made the remark that while that case differed from this in the fact that there the witness had no recollection of the matter independently of the memorandum referred to, the court did not place its decision upon that ground. Although in that case the court did not expressly declare that the admissibility of the evidence was dependent upon the want of recollection of the witness, the fact existed which rendered the paper competent evidence within the rule as before stated; and reference was there, with apparent approval, made to *Russell v. Hudson River R. R. Co., supra*, where the judgment of the court below was reversed for error in receiving a memorandum in evidence when, for aught that appeared, the witness had recollection of the facts to which he was called upon to testify, independently of it. And the cases above cited, determined subsequently to *Guy v. Mead, supra*, state and adhere to the doctrine that original entries made by a witness are admissible as auxiliary to his evidence only when he is unable to distinctly recollect the fact without the aid of it. This proposition seems well settled in this state by a current of authority for the last fifty years, which now requires adherence to it, unless it may be seen that it works unjustly upon the rights of the parties. The rule which renders such entries admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which they relate. The primary common-law proof is then furnished, and the necessity for evidence of the lesser degree does not arise. And this right, so qualified, to introduce such secondary evidence is the better rule, in view of the opportunity which otherwise might exist to superadd a written memorandum to the evidence of a witness, which it cannot be said might not sometimes be improperly made available to strengthen his testimony with a court or jury, and such may be within reasonable apprehension until the moral infirmity of human nature becomes exceptionally less than it yet has. This reason for the rule so limited has also been in the minds of the courts in deciding the cases declaring it: *Meacham v. Pell*, 51 Barb. 65-68; *Driggs v. Smith*, 4 Jones & S. 283; *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134.

In holding, as we do, that entries made by a witness are not admissible, unless it appear that he does not recollect the occurrence to which they relate independently of them, we but

reaffirm what may be deemed the rule already quite well established in that respect. In the present case it not only did not so appear, but the evidence of the defendant fairly indicated that his recollection was distinct of the facts in issue to which his memoranda referred. The ruling which permitted the entries to be read in evidence, therefore, was error, unless they may, as contended by the defendant's counsel, be considered admissible as part of the *res gestæ*. It is difficult to see that it does, and we think it does not come within that doctrine. The entries were made by defendant, and were descriptive of the papers indorsed by him. The acts which he then was called upon to do, and did do, were to indorse the checks. The fact of the indorsement by him of his name upon them is not questioned. The act of making the entries was not illustrative of that of the indorsement, nor did it tend to characterize it, and it does not come within the rule requisite to permit it to be treated as part of the transaction: Wharton's Ev., sec. 259; *Nutting v. Page*, 4 Gray, 584; *Moore v. Meacham*, 10 N. Y. 207; *Tilson v. Terwilliger*, 56 Id. 277.

The case of *Bigelow v. Hall*, 91 N. Y. 145, is not applicable in that respect to the situation presented in this case. There the parties participated in making the entries at the time of the transaction, and they had relation to it, while here the current entries were made by the defendant alone, and all that Fowks appears to have done was to make from time to time entry of a supposed past act of payment of a previously indorsed check, and that was done before the defendant's entry descriptive of the succeeding one, and with the latter entry the party procuring the indorsement had nothing to do, nor does it appear that he was then advised of the entry as made by the defendant: *Brown v. Thurber*, 58 How. Pr. 95-97.

The evidence of the person who represented the drawer of the checks, and drew them as her attorney, was contradictory of that given by the defendant, Madden, in every respect essential to the issue presented at the trial. It cannot be seen that the reading to the jury of the memoranda may not have had some influence upon their action on the main question of fact, which they were required to determine.

The alleged alteration was a material one, and the finding that it was made after the defendant's indorsement, and without his consent, presumptively required the conclusion that the checks so altered were rendered invalid as against the indorser, and that such defendant was entitled to a ver-

dict: *Crawford v. West Side Bank*, 100 N. Y. 50; 53 Am. Rep. 152.

The presumption in such case is, that it was so made as to vitiate it, and the burden is with the party seeking to make an altered instrument the basis of recovery to relieve it from the effect of the unauthorized alteration, which may be done by showing that it was made by a stranger to it: *Waring v. Smyth*, 2 Barb. Ch. 119; 47 Am. Dec. 299; *Herrick v. Malin*, 22 Wend. 388; *Smith v. McGowan*, 3 Barb. 404.

Nothing appears in this case to indicate that any relief in that manner can be had from the effect of the alteration, if the jury find it was made after the indorsement, and without the knowledge or consent of the indorser.

No other question presented here by the plaintiff's counsel seems to require consideration.

The judgment should be reversed, and a new trial granted, costs to abide the event.

WITNESSES — MEMORANDUM. — A witness may always use a memorandum to refresh his memory, when in fact he does testify from his memory thus refreshed: *Card v. Foot*, 56 Conn. 369; 7 Am. St. Rep. 311, and note 316; *Spring G. M. I. Co. v. Evans*, 15 Md. 54; 74 Am. Dec. 555; *Martin v. Good*, 14 Md. 398; 74 Am. Dec. 545; *Hill v. State*, 17 Wis. 675; 86 Am. Dec. 736; *Henderson v. Halsey*, 11 Smedes & M. 9; 49 Am. Dec. 41; *Dunlap v. Berry*, 4 Scam. 327; 39 Am. Dec. 413; *Holladay v. Marsh*, 3 Wend. 142; 20 Am. Dec. 678; *Pearson v. Wightman*, 1 Mill Const. 336; 12 Am. Dec. 636; *Riordan v. Davis*, 9 La. 239; 29 Am. Dec. 442; *Nicholson v. Withers*, 2 McCord, 428; 13 Am. Dec. 739; *Johnson v. Culver*, 116 Ind. 279.

ALTERATION OF INSTRUMENTS. — A material alteration of a negotiable instrument, after its execution and delivery to payee as a complete contract, avoids it except as against the parties consenting to such alteration: *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18, and note 25, 26; *Waring v. Smyth*, 2 Barb. Ch. 119; 47 Am. Dec. 299, and note 304, 305; and see extended note to *Woodworth v. Bank of America*, 10 Am. Dec. 267-273. Every alteration on the face of an instrument of writing detracts from its credit, and makes it suspicious; and the party claiming under it is ordinarily bound to remove the suspicion: *Elgin v. Hall*, 82 Va. 680; *Priest v. Whitacre*, 78 Id. 151; and to the same effect substantially is *Hill v. Nelsa*, 86 Ala. 442.

CLARK v. McNEAL.

[114 NEW YORK, 287.]

ORIGINAL EQUITY REATTACHES TO PROPERTY IN HANDS OF GRANTEE OF BONA FIDE PURCHASER, WHEN. — The rule that the grantee of a *bona fide* purchaser of real estate takes a good title thereto, although he takes it with full knowledge of an equitable claim thereto existing in another person, is subject to this exception, that if the transfer is back to the original purchaser, who was guilty of constructive fraud in transferring the property, when it becomes revested in him, the original equity will reattach to it in his hands.

PERSON NOT CALLED AS WITNESS IN HIS OWN BEHALF, nor in behalf of a person who has succeeded to his interest, is not incompetent to testify under section 829 of the Code of Civil Procedure.

ACTION to foreclose a mortgage dated and recorded February 21, 1856, given by Jonah Miller to A. H. Impson to secure the payment of one thousand dollars, according to the condition of a bond accompanying the same. The bond and mortgage were duly assigned for value, April 30, 1856, by Impson to Matilda C. Durland, April 1, 1861, by the latter to James Durland, and January 30, 1880, by said James Durland to the plaintiff. None of these assignments were recorded. On May 1, 1863, the lands in question were conveyed to H. V. McNeal, who, in the deed, assumed the mortgage, and did pay the interest thereon to the holder thereof until February 13, 1880, as it became due. On October 1, 1873, McNeal and wife, for value, mortgaged the premises to Joseph V. Whelan to secure the payment of two thousand dollars. This mortgage was duly recorded October 3, 1873. Whelan died subsequently, and the defendants Crosby are his executors. On October 11, 1873, Impson, at the request of McNeal, but without any consideration, and without the knowledge or consent of the assignees of said Impson mortgage, caused the same to be canceled of record. The plaintiff purchased for full value, and without notice that her mortgage had been satisfied, except such as is implied from the record, which she did not examine, and upon McNeal's assurance that it was the first lien upon the said lands. Prior to January 22, 1876, Henry V. McNeal and one William McNeal were copartners, and as such were indebted to Homer Ramsdell & Co., a firm then composed of Homer Ramsdell and George W. and James A. Townsend, in the sum of five thousand dollars, to secure which they executed to the persons composing the latter firm a mortgage covering the lands described in the plaintiff's mortgage. This mortgage was recorded January 26, 1876, and

before it was given Homer Ramsdell and George W. Townsend were each notified that the mortgage held by the plaintiff was a subsisting and first lien upon said lands. James A. Townsend afterwards retired from the said firm and assigned his interest in said mortgage to his copartners, who thereupon formed a new partnership under the same name, and as such held and owned said mortgage. This assignment was dated February 4, 1876, and was recorded February 2, 1877. Homer Ramsdell and George W. Townsend, on February 1, 1877, for full value, assigned their bond and mortgage to the executors of one De Wint, and guaranteed its payment. The executors accepted said assignment, and recorded it February 2, 1877, without actual notice of plaintiff's mortgage, and without examining the records. Before the commencement of this action, De Wint's executors commenced an action, to which the plaintiff herein was not made a party, to foreclose their mortgage, and the usual judgment was, without the knowledge of the plaintiff, perfected on June 20, 1881, with the usual provision for judgment, for deficiency against H. V. McNeal, William McNeal, and Homer Ramsdell, individually, and against the executors of George W. Townsend, who had in the mean time died. This action was commenced May 12, 1881, against all of the present defendants except Homer Ramsdell, George W. Townsend's executors, J. A. P. Ramsdell, and W. E. Carvey, to cancel the satisfaction of plaintiff's mortgage, and to establish its lien as prior to that of the defendants. This action resulted in a decree that the lien of the mortgage of De Wint's executors was prior to that of plaintiff's mortgage, but that the lien of the mortgage held by the executors of Whelan was "subject and subsequent to the lien of plaintiff's mortgage, and prior to the lien" of any defendant in the action; that the satisfaction of plaintiff's mortgage was null and void, and should be canceled of record. The complaint was dismissed as to De Wint's executors. The court of appeals, on appeal, modified this judgment by directing that the plaintiff, upon paying the amount due to De Wint's executors, including their costs, should be subrogated to all their rights under their said judgment, bond, mortgage, and the guaranty of Homer Ramsdell & Co., and directing said executors, "on said payment being made within ninety days," to assign to the plaintiff their judgment, bond, mortgage, and guaranty. The plaintiff thereupon paid the costs and tendered the remainder required to be paid, but the executors of De Wint declined to accept the pay-

ment, or to make the transfer, because, pending the appeals, their decree of foreclosure had been enforced by a sale, and Homer Ramsdell and the executors of his deceased partner had paid, in accordance with said guaranty, the amount remaining unpaid upon said bond, mortgage, and judgment. At this sale the premises in controversy were struck off to one J. A. P. Ramsdell for fifty dollars, but he was not present at the sale, and neither authorized nor paid the bid, which was made by the direction of said guarantors, and for their benefit. The referee who conducted the sale, without receiving the amount of the bid, executed a deed to said J. A. P. Ramsdell, who subsequently conveyed to the defendant W. E. Carvey. The negotiations for the purchase by Carvey were had by the representatives of said guarantors, who received the consideration, and indemnified Carvey from loss by reason of the claim of plaintiff. Before Carvey purchased, he was fully informed of the pendency of this action, and of the existence of the plaintiff's mortgage, and of her claim to priority. The plaintiff having filed a supplemental complaint making Ramsdell, Townsend's executors, and Carvey parties, the action was tried, and the court found, among others, the foregoing facts; and, as a conclusion of law, that plaintiff's mortgage was a valid and subsisting lien upon the lands in question prior to the interest of any of the defendants, and that she was entitled to judgment of foreclosure and sale against all of the defendants. Judgment was entered accordingly, which on appeal was affirmed by the general term, and the defendants appealed.

E. Countryman, for the appellants.

Henry Bacon, for the respondent.

VANN, J. The lien of plaintiff's mortgage was prior to that of the mortgage of Ramsdell & Co., before they assigned it to a *bona fide* purchaser, because they accepted the latter without actual notice of the existence of the former. But after the purchase of the Ramsdell mortgage by the executors of De Wint, in good faith and for full value, it became, in their hands, prior in lien to that of plaintiff's mortgage, owing to the protection afforded by the recording act. Upon the former appeal, this court sought to protect the equity of plaintiff as against Ramsdell & Co. by permitting her to acquire the rights which the executors of De Wint had obtained by their purchase, including the guaranty contained in the assignment

of the Ramsdell mortgage: *Clark v. Mackin*, 95 N. Y. 346. Prior to the judgment of this court, however, the land in question had been sold under the decree based upon the Ramsdell mortgage, and Ramsdell & Co. had discharged their guaranty by payment of the deficiency. Otherwise, the plaintiff could have acquired the Ramsdell mortgage, and could have been subrogated to the rights of the holders thereof. If a sale had been made, she would have been entitled to have her mortgage first paid out of the proceeds, and after application of the residue upon the other mortgage, could have collected from Ramsdell & Co. any deficiency then remaining. In order to accomplish the same result in the only way then available, a supplemental complaint was filed, and the parties who were necessary, owing to the change of circumstances, were brought in. Upon the trial of the new issues, the court found that Ramsdell & Co. were virtually the purchasers at the foreclosure sale, and that the defendant Carvey took title from their representative upon being indemnified by them against loss by reason of plaintiff's claim to priority, of which claim he was fully informed. The situation is, therefore, the same as if Ramsdell & Co. now owned the premises through a purchase in their own names under the decree of foreclosure. The question presented is, whether such a purchase by them, under all the circumstances, would give them a title free from the lien of plaintiff's mortgage. The appellants claim that it would, upon the ground that a purchase from one who is protected by the recording act against a prior unrecorded mortgage is himself protected, even if he had actual notice at the time of his purchase. It is clear that a sale to any one except Ramsdell & Co., or their representative, would have destroyed the lien of plaintiff's mortgage. But a sale to Ramsdell & Co., or to one who purchased for them, would not have this effect. As the lien of their mortgage, while they held it, was subject to that of the plaintiff's, so their title acquired under that mortgage would be subject to the same lien. By selling the mortgage, they did not destroy plaintiff's equity, but simply prevented her from asserting it against a *bona fide* purchaser. If they had afterward bought the mortgage, the equity would have at once reattached, and when they bought the land upon a sale under the mortgage, the equity of plaintiff's lien forthwith revived.

It is a familiar principle that where one purchases with full notice of the equitable claim of another to the same property,

he will not be permitted to protect himself against that claim, but his own title will be postponed and made subservient to it. This is upon the ground that he is guilty of constructive fraud. If, however, he transfers to a *bona fide* purchaser, the latter not only takes a good title, but can transfer a good title, even to one who purchases with notice of the facts, as otherwise the *bona fide* purchaser could not get the market value of his property. To this general rule, however, there is an exception. The principle of protection does not extend to the one guilty of the constructive fraud, even if he purchases from a *bona fide* purchaser.

The rule as stated in Story's Equity Jurisprudence, section 410, is, "that it is wholly immaterial of what nature the equity is, whether it is a lien or an encumbrance, or a trust, or any other claim; for a *bona fide* purchaser of an estate for a valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud. But if the estate becomes revested in him, the original equity will reattach to it in his hands."

The rule and the exception are laid down in Pomeroy's Equity Jurisprudence, section 754, as follows: "If the title to land having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value, and without notice, it is at once freed from these equities; he obtains a valid title, and with a single exception the full power of disposition. This exception is, that such a title cannot be conveyed free from the prior equities back to a former owner who was charged with notice."

The authorities are uniform upon the subject, so far at least as they apply to the facts of this case: *Schutt v. Large*, 6 Barb. 373, 380; *Ely v. Wilcox*, 26 Wis. 91; *Church v. Ruland*, 64 Pa. St. 432; *Quinn v. Fuller*, 7 Cush. 224; *Kost v. Bender*, 25 Mich. 515; Daniel on Negotiable Instruments, sec. 805.

The appellants insist that the witnesses McNeal should not have been permitted to testify to conversations between themselves and George W. Townsend, deceased, upon the ground that such evidence was inadmissible under section 829 of the Code of Civil Procedure.

We think the evidence was competent. The plaintiff did not derive her title to the mortgage through either of the Mc-

Neals. Neither of them ever owned it. They were not called in their own behalf, nor in behalf of a person who had succeeded to their interest. The action could not have so resulted as to add to or take from their liability. One of them was not a party to the action, and the other interposed no defense.

The judgment should be affirmed, with costs.

BONA FIDE PURCHASERS OF REALTY without notice of mistake in the certificate of a deed do not by reconveying to their grantors thereby transmit to them the superior equity acquired by them as innocent purchasers for valuable consideration without notice: *Simpson v. Montgomery*, 25 Ark. 365; 89 Am. Dec. 228.

ROOT v. LONG ISLAND RAILROAD COMPANY.

[114 NEW YORK, 300.]

RAILROAD COMPANY CANNOT UNREASONABLY OR UNJUSTLY DISCRIMINATE between its customers in its charges for carrying freight, where the conditions are equal. What will amount to unjust discrimination is a question of fact, ordinarily to be determined upon consideration of all the facts and circumstances of the case.

CONTRACT BY RAILROAD COMPANY TO CARRY COAL FOR PARTICULAR PERSON AT REBATE of fifteen cents per ton from the regular tariff rates, in consideration of his expending a large sum of money in building on the company's lands, and in part for its use and convenience, a dock and pocket for storing coal, and of his undertaking to ship coal in large quantities, and to load it upon the cars, cannot be declared void as against public policy, in the absence of any finding as a matter of fact that there was an unjust discrimination. In such a case, it cannot be determined as a matter of law that the discrimination was unjust.

ACTION to recover rebate for coal transported by the defendant. The opinion states the case.

Edward E. Sprague, for the appellant.

Francis Lynde Stetson, for the respondent.

HAIGHT, J. In June, 1876, the defendant and one Quintard entered into a written contract, which, among other things, provided that Quintard should build, at Long Island City, upon the lands of the defendant, a dock 250 feet long and 40 feet wide, and erect thereon a pocket for holding and storing coal, according to certain plans and specifications annexed. The defendant was to have the use of the south side of the dock, and also of thirty feet of the shore end, and the right to use the other portions thereof when not required by Quintard.

In consideration therefor, the defendant agreed with Quintard to transport in its cars all the coal in car-loads offered for transportation by him at the rebate of 15 cents per ton of 2,240 pounds from the regular tariff rates for coal transported by the defendant from time to time, except in the case of the coal carried for the Brooklyn Water Works Company, with which company the defendant reserved the right to make a special rate, which should not be considered "the regular tariff rate." The defendant also agreed with Quintard to provide him with certain yard-room and office-room free of rent, and the contract was to continue for the term of ten years, and at the termination of the contract the dock and structures were to be appraised, and the value thereof, less the sum of two thousand dollars advanced by the defendant, to be paid to Quintard. Pursuant to this agreement, the dock and coal-pocket were constructed at an expense of seventeen thousand dollars, and coal in large quantities was shipped over the defendant's road by Quintard or his assignee under the contract; and it is for the rebate of fifteen cents per ton upon the coal so shipped that this action was brought.

The defense is, that the contract was against public policy, and was therefore illegal and void. The defendant is a railroad corporation organized under the laws of the state, and was therefore a common carrier of passengers and freight, and was subject to the duties and liabilities of such. These duties and liabilities have often been the subject of judicial consideration in the different states of the Union. In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination to individuals; that its charges must be reasonable: *Chicago etc. R. R. Co. v. People ex rel. Koerner*, 67 Ill. 11; 16 Am. Rep. 599; *Vincent v. Chicago etc. R. R. Co.*, 49 Ill. 33. In Ohio it was held that where a railroad company gave a lower rate to a favored shipper, with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances: *Scofield v. Railroad Co.*, 43 Ohio St. 571; 54 Am. Rep. 846. In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same conditions for others is void as creating an illegal preference; that common carriers are public agents transacting

their business under an obligation to observe equality towards every member of the community; to serve all persons alike, without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation of goods: *Messenger v. P. R. R. Co.*, 36 N. J. L. 407; 13 Am. Rep. 457; *State ex rel. Atwater v. D., L., & W. R. R. Co.*, 48 N. J. L. 55; 57 Am. Rep. 543. In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them as early as means will allow; that it cannot directly exercise unreasonable discrimination as to whom and what it will carry; that it cannot impose unreasonable or unequal terms, facilities, or accommodations: *McDuffee v. P. & R. R. Co.*, 52 N. H. 480; 13 Am. Rep. 72. To similar effect are cases in other states: *New England Ex. Co. v. M. C. R. R. Co.*, 57 Me. 188; *Shipper v. P. R. R. Co.*, 47 Pa. St. 338; *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Menacho v. Ward*, 27 Fed. Rep. 529.

In New York the authorities are exceedingly meager. The question was considered to some extent in the case of *Killmer v. New York etc. R. R. Co.*, 100 N. Y. 395, 53 Am. Rep. 194, in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded ten per cent of the capital actually expended, did not relieve the company from its common-law duty as a common carrier; that the question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question, into which enters many elements for consideration.

In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required; for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Nu-

merous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must, therefore, be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination, all the facts and circumstances must be taken into consideration. This raises a question of fact which must ordinarily be determined by the trial court.

The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and consequently there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court.

Is the provision of the contract, therefore, providing for a rebate of fifteen cents per ton from the regular tariff rates an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination, but upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal-pocket, which was to be constructed upon the defendant's premises at an expense of seventeen thousand dollars, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others.

Therefore, in this case, the question is one of fact, and not of law, and inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed.

The defendant, in its answer, alleged that the rebates accruing between the first day of January and the thirty-first day of October, 1879, were waived by the parties. The referee, upon request, refused to find that this was the case, and an exception was taken to such refusal.

Had we been sitting as a trial court, it is possible we should have reached a different conclusion, but on review, the evidence is too meager and indefinite to justify a reversal.

The judgment should be affirmed, with costs.

DISCRIMINATIONS BY RAILWAYS, WHAT ARE UNREASONABLE AND UNLAWFUL. — It is a general and well-established principle of law that a common carrier, in the performance of his public service of transportation, cannot make unjust or unreasonable discriminations between, nor give undue or unreasonable preferences to, persons applying to him for the transportation of persons or goods, either in granting carriage to some and not to others, or in carrying for some at less rates than for others: *Hays v. Pennsylvania etc. Co.*, 12 Fed. Rep. 311; *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; 68 Am. Dec. 562; *Indianapolis etc. R. R. Co. v. Ervin*, 118 Ill. 250; *St. Louis etc. R. R. Co. v. Hill*, 14 Ill. App. 579; *Indianapolis etc. R. R. Co. v. Rinard*, 46 Ind. 293; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72. In the case last cited, Doe, J., delivering the opinion of the court, said: "A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one, and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all." But all discriminations are not necessarily unreasonable or unjust, and it is only those which are unreasonable or unjust that are unlawful: *Johnson v. Pensacola etc. R. R. Co.*, 16 Fla. 623; 26 Am. Rep. 731; *Chicago etc. R. R. Co. v. People*, 67 Ill. 11; 16 Am. Rep. 599; *St. Louis etc. R. R. Co. v. Hill*, 14 Ill. App. 579; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72; *Houston etc. R'y Co. v. Rust*, 55 Tex. 98. It is not an easy matter to determine what are and what are not unreasonable and unjust discriminations. So much necessarily depends upon the particular circumstances of each individual transaction, that it is extremely difficult to lay down any general rule on the subject. At common law, and in the absence of statutory regulations, it has been held that a common carrier is not bound to treat all who employ him with absolute equality, provided the rates he charges are reasonable to all, and that a particular customer has no right to complain if the rate to him is reasonable, though other persons are charged a less rate, or even nothing at all, for the same service: *Bazendale v. Eastern Counties R'y Co.*, 4 Com. B. 63; *Great Western R'y Co. v. Sutton*, 4 H. L. Cas. 239; *Johnson v. Pensacola etc. R. R. Co.*, 16 Fla. 623; 26 Am. Rep. 731; *Eclipse Towboat Co. v. Pontchartrain R. R. Co.*, 24 La. Ann. 1; *Fitchburg R. R. Co. v. Gaye*, 12 Gray, 393; *Sargent v. Boston etc.*

R. R. Co., 115 Mass. 422; *Ragan v. Aiken*, 9 Lea, 609; 42 Am. Rep. 684; *Menacho v. Ward*, 27 Fed. Rep. 529; 1 Wood's Railway Law, 566; *Pierce on Railroads*, 499. In delivering the opinion of the court in *Menacho v. Ward*, *supra*, Wallace, J., said: "Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the carrier in his relations with the public." And Cooper, J., delivering the opinion of the court in *Ragan v. Aiken*, *supra*, said: "If the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may nevertheless lower the charge of another person if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a different route. Under these circumstances, we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged, if the charges on their goods were reasonable." But even where the rate charged by a railway company is reasonable, the tendency of the modern authorities and of recent legislation in this country is to stamp discrimination as unjust and unlawful if it subjects others to unreasonable disadvantages, or is made in order to give one individual a preference to the disadvantage of another, or to give preference or advantage to one locality to the prejudice of another locality. A railway company may, as a matter of charity, render a transportation service without price, or for less than a reasonable price, but it has no right to reimburse itself by charging others more than a reasonable price. A discrimination against a particular person or locality is unjust unless some good reason can be shown to justify it, for, under like circumstances, and for the same class of goods, the same rates should be charged to all: 1 Wood's Railway Law, 566; *Chicago etc. R. R. Co. v. People*, 67 Ill. 11; 16 Am. Rep. 599; *Indianapolis etc. R'y & Rindard*, 46 Ind. 293; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72; *Ragan v. Aiken*, 9 Lea, 609; 42 Am. Rep. 684; *Houston etc. R'y Co. v. Rust*, 58 Tex. 98; *London etc. R'y Co. v. Boershed*, L. R. 3 App. C. 1029. In the case of *Chicago etc. R. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599, Lawrence, C. J., delivering the opinion of the court, referring to railway companies, said: "It was never intended or expected that these corporations should use their power to benefit particular individuals or to build up particular localities by arbitrary discriminations in their favor that must cause injury to other persons or places engaged in rival pursuits or occupying rival positions. It is in vain to say, in defense of such discriminations, made without just cause, that the rate of charges against the injured person or locality is a reasonable rate, and therefore no injury is done. An injury, as a matter of fact, is committed in the manner just suggested, and the legislature has the right to require the corporation to show a sufficient cause for the discrimination which produces the injury, and it cannot be permitted to

evade the issue by raising the speculative inquiry as to whether the rates charged against the injured parties or localities are not, after all, reasonable rates. Even if reasonable, when regarded in reference to the profit upon the capital invested in the road, they are not reasonable, in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or for greater services rendered to persons doing business with the company at neighboring stations."

When a real discrimination has been made, and that fact appears, the question to be next determined is, whether the discrimination is unjust or not. In determining this question, the court may take into consideration the fair interests of the railway company itself: *Ransome v. Eastern Counties R'y Co.*, 1 Com. B., N. S., 457; 1 Nev. & Macn. 63; *Ragan v. Aiken*, 9 Lea, 609; 42 Am. Rep. 684. A mere inequality of charge does not conclusively show that an undue preference has been given: 1 Wood's Railway Law, 573. In the recent case of *Bayles v. Kansas etc. R'y Co.*, decided by the supreme court of Colorado, September, 1889, it was held that, under the constitution of that state forbidding "undue or unreasonable discrimination" by railway companies in freight charges, a contract by such company to carry freight for the plaintiff at a special rate, less than its published schedule rates, was not void as being an unjust discrimination, and against public policy, in the absence of evidence that such special rate was an exclusive privilege. In *Chicago etc. R. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599, a statute passed by the legislature of that state which forbade any discrimination whatever, under any circumstances, and whether just or unjust, was held to be unconstitutional. The constitution of the state empowered the legislature to pass laws to prevent unjust discriminations and extortion in the rates of freight and passenger tariffs on the different railroads of the state, and Lawrence, C. J., in delivering the opinion of the court, said: "This provision, expressly directing the legislature to pass laws to prevent unjust discrimination, is a recognition of the palpable fact that there may be discriminations which are not unjust, and by implication, it restrains the power of the legislature to a prohibition of those which are unjust."

DISCRIMINATIONS, WHEN JUST AND LAWFUL. — A railway company may discriminate in favor of persons shipping large quantities of freight: Wood's Railway Law, 567; *Portsmouth etc. R. R. Co. v. Forsaith*, 59 N. H. 122; *Nicholson v. Great Western R'y Co.*, 1 Nev. & Macn. 121; *Greenop v. South Eastern R'y Co.*, 2 Id. 319. In delivering the opinion of the court in *Portsmouth etc. R. R. Co. v. Forsaith*, *supra*, Allen, J., said: "The expense of handling, carrying, and storing the smaller amount is much greater, *pro rata*, than that of the same operations upon the larger amounts in one body, and a discrimination in favor of the larger dealers is not inequality, but reasonable equality." But in the case of *Scotfield v. Railway Co.*, 43 Ohio St. 571, 54 Am. Rep. 846, a contract whereby a railroad company, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agreed to make a rebate on the published tariff on such freights, to the prejudice of other shippers of like freights under the same circumstances, was held to be contrary to public policy and void. Atherton, J., who delivered the opinion of the court, referring to a discrimination resting exclusively on the amount of freight supplied by the respective shippers, said: "We . . . hold that a discrimination in the rate of freights resting exclusively on such a basis ought not to be sustained. The principle is opposed to sound public policy. It would build up and foster monopolies, add largely to the accumulated power of capital and money, and

drive out all enterprise not backed by overshadowing wealth. With the doctrine as contended for by the defendant recognized and enforced by the courts, what will prevent the great interests of the Northwest, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregate wealth, and in league with the railroads of the land, from driving to the wall all private enterprise struggling for existence, and with an iron hand thrusting back all but themselves?"

A railroad company may also, unless restrained by statute, discriminate in favor of longer distances: *St. Louis etc. R. R. Co. v. Hill*, 14 Ill. App. 579; *Herah v. Northern C. R'y Co.*, 74 Pa. St. 188. It is also held not to be unreasonable or unjust for a railroad company to charge a higher rate for local freight than for through-freight, where the rates are the same for all persons in like circumstances: *Shipper v. Pennsylvania R. R. Co.*, 47 Id. 338; *Pierce on Railroads*, 499. The fact that there is competition in the carriage of persons or property to or from a particular place is a circumstance that justifies a common carrier, under section 4 of the Interstate Commerce Act, to charge less for a long haul to or from such place than for a short one included therein: *Ex parte Koehler*, 25 Fed. Rep. 73; 31 Id. 315. In *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684, it was held that, in order to secure freight which would otherwise go by a different route, a railroad company may discriminate in rates in favor of persons living at a distance from its route, provided its charges against others not similarly situated are reasonable. See also *Ex parte Benson*, 18 S. C. 38; 44 Am. Rep. 564; *Mundall v. Pennsylvania R. R. Co.*, 92 Pa. St. 150. A railroad company may discriminate in favor of one class of goods over others of a different class, where the labor, risk, and expense of carrying such classes of goods are different: 1 Wood's Railway Law, 570. It is proper and may be the duty of a railroad company to forward perishable property before it does that which is non-perishable, although the latter may have been first received: *Tierney v. New York etc. R. R. Co.*, 76 N. Y. 305. If by reason of gradients, or otherwise, the cost of conveying coal by one branch of a railway is greater than the cost on another branch, a proportionate difference may be made by the company in mileage rates: *Nishill etc. Coal Co. v. Caledonian R'y Co.*, 2 Nev. & Macn. 39. And generally it is competent for a railway company to enter into contracts or special agreements whereby advantages may be secured to individuals in the transportation of goods upon the railway, where it is made clearly to appear that, in entering into such contracts or agreements, the company has in view only the interests of the proprietors and the legitimate increase of the profits of the road, and the consideration given to the company in return for the advantages offered is adequate, and the company is willing to afford the same facilities to all others upon the same terms: *Nicholson v. Great Western R'y Co.*, 1 Nev. & Macn. 121; *Greenop v. South Eastern R'y Co.*, 2 Id. 319.

DISCRIMINATION IN FAVOR OF PASSENGERS PURCHASING TICKETS AT OFFICE is just and reasonable, and a passenger who, having had an opportunity to buy a ticket at the office of the company, fails to do so, may be compelled to pay an additional sum for his fare: *Bland v. Southern Pacific R. R. Co.*, 55 Cal. 570; 36 Am. Rep. 50; *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; 63 Am. Dec. 562; *St. Louis etc. R. R. Co. v. Dally*, 19 Ill. 352; *St. Louis etc. R. R. Co. v. South*, 43 Id. 176; 92 Am. Dec. 103; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; 38 Ind. 116; 10 Am. Rep. 103; *Indianapolis etc. R'y Co. v. Rinard*, 46 Ind. 293; *Toledo etc. R'y Co. v. Wright*, 68 Id. 586; 34 Am. Rep. 277; *State v. Chovin*, 7 Iowa, 204; *Everett v. Chicago etc. R'y Co.*,

69 Id. 15; 58 Am. Rep. 207; *State v. Gould*, 53 Me. 279; *Du Laurans v. First Dis. St. P. & P. R. R. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *State v. Hungerford*, Sup. Ct. Minn., June, 1888; *Hilliard v. Gould*, 34 N. H. 230; 66 Am. Dec. 766; *Bordeaux v. Erie R'y Co.*, 8 Hun, 579; *Pool v. Northern Pac. R. R. Co.*, 16 Or. 261; *Stephen v. Smith*, 29 Vt. 160.

DISCRIMINATION, WHEN UNREASONABLE AND UNLAWFUL.—A common carrier cannot discriminate against a person who refuses to patronize him exclusively: *Menacho v. Ward*, 27 Fed. Rep. 529. It is not a legitimate ground for giving a preference to one of the customers of a railway company that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question. And it is unreasonable and unjust to charge more or less for the same service, according as the customer thinks proper or not to bind himself to employ the company in other and totally distinct business: *Baxendale v. Great Western R'y Co.*, 1 Nev. & Macn. 191; *Bellsdyke Coal Co. v. North British R'y Co.*, 2 Id. 105. The refusal of a railroad company to sell to a particular person a commutation ticket under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public is an unjust discrimination against him, and a violation of the principle of equality which the company is bound to observe in the conduct of its business: *Atwater v. Delaware etc. R. R. Co.*, 48 N. J. L. 55. It is unjust discrimination for a railway company to refuse to receive goods from one person after a certain hour, when it receives similar goods from another person after that hour: *Garton v. Bristol & E. R'y Co.*, 1 Best & S. 112. A railway company cannot discriminate in favor of those who purchase tickets before entering its cars, unless it gives to passengers an opportunity to purchase tickets at the office: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; 68 Am. Dec. 562; *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; 38 Ind. 116; 10 Am. Rep. 103; *Du Laurans v. First Dis. St. P. & P. R. R. Co.*, 15 Minn. 49; 2 Am. Rep. 102. But when a reasonable time has been allowed to procure tickets before the starting of the train, the company is not bound to keep open the ticket-office at a small station until the very moment of starting: *Beckett v. Chicago etc. R'y Co.*, 69 Iowa, 15; 58 Am. Rep. 207. A railroad company cannot discriminate against passengers on account of their color, race, social position, or their political or religious beliefs: *Chicago etc. R'y Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641; *West Chester R. R. Co. v. Miles*, 55 Pa. St. 209. A railroad company cannot discriminate in favor of itself or any of its employees as against other shippers: *Cumberland Valley R. R. Co.'s Appeal*, 62 Pa. St. 218. Though a railway company may charge more proportionately for small than for large packages, yet if all the small packages are united in one large package and delivered to the company in that package, consigned to one person, and the trouble and responsibility are the same, no discrimination can be made: *Pickford v. Grand Junction R'y Co.*, 10 Mea. & W. 399. Discriminations based solely upon the amount of freight shipped, without any reference to conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights granted to every citizen, and a wrong to the disfavored party: *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Rothschild v. Wabash R. R. Co.*, 15 Mo. App. 242. Railway companies cannot make injurious discriminations between individuals, and therefore they cannot charge one rate for delivering grain at a particular elevator in a city, and a higher rate for delivering at another elevator in the same city, and equally accessible upon their lines: *Vincent v. Chicago etc. R. R. Co.*,

49 Ill. 33; *Chicago etc. R'y Co. v. People*, 56 Id. 365; *Chicago etc. R. R. Co. v. People*, 67 Id. 11; 16 Am. Rep. 599; *St. Louis etc. R. R. Co. v. Hill*, 14 Ill. App. 579. And a contract by which a railroad company agrees to carry goods for one person for cheaper rates than it will carry for other persons and the public generally, in like circumstances, under the same conditions, and for like distances, is void as creating an illegal preference and making an unjust discrimination: *Indianapolis etc. R. R. Co. v. Ervin*, 118 Ill. 250; *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407; 13 Am. Rep. 457; 37 N. J. L. 531; 18 Am. Rep. 754; *Scofield v. Railway Co.*, 43 Ohio St. 571; 54 Am. Rep. 846. In *Handy v. Cleveland etc. R. R. Co.*, 31 Fed. Rep. 689, the receiver of a railroad made a contract with the Standard Oil Company to carry its oil for ten cents per barrel, to charge its rivals thirty-five cents per barrel, and to pay twenty-five cents of the latter rate to the Standard Oil Company. This was held to be such gross and wanton discrimination as to warrant the removal of the receiver. In *Samuels v. Louisville etc. R. R. Co.*, a railroad company which carried freight for two lines of river steamers systematically charged one line fifty cents per hundred pounds more than the other. This was held to be an unjust discrimination, and the fact that the higher rate was not unreasonable was held not to affect the question of discrimination. In *Burlington etc. R'y Co. v. Northwestern Fuel Co.*, 31 Fed. Rep. 652, a contract by which a railroad company agreed to charge a rate of not less than \$2.40 per ton to all persons shipping less than 100,000 tons of coal per annum over its road, and to make a rate of \$1.60 per ton to all persons shipping over 100,000 tons per annum, was held to constitute a case of discrimination so gross that it could not be sustained. In *People v. Wabash R'y Co.*, the railway company charged fifteen cents per hundred pounds for carrying freight from Peoria to New York, and twenty-five cents per hundred pounds for carrying freight from Gilman, a point eighty-six miles east of Peoria, to New York. This was held to be an unjust discrimination under the Illinois statute. In *Illinois Cent. R. R. Co. v. People*, the railroad company charged ten cents per hundred pounds for carrying green coffee from Chicago to Mattoon, a distance of 172 miles, and on the same day it charged another person sixteen cents per hundred pounds for carrying green coffee from Chicago to Kankakee, a distance of only fifty-six miles in the same direction and over the same road. This was held to be an unlawful discrimination, and the fact that there existed no competition in the grocery trade between Mattoon and Kankakee was held to constitute no defense in an action against the company for unjust discrimination. It was also held that the fact that at a given point there is competition among railroads for freights, and that some of them are charging reduced or "cut" rates does not justify a railroad company in discriminating in favor of such point as against other points on the line of its road. Scholfield, J., who delivered the opinion of the court in that case, said: "We recognize the right of railroad companies to offer special inducements to shippers to obtain carriage of their freight; but such inducements, in our opinion, must not only be uniform to all in like situation, but also be reasonably justified by the expenses of the carriage to the company, and the anticipated profits resulting to the company from the carriage, presently and prospectively, in view of all the circumstances affecting those questions. We concede that, as a matter of fact, there must be slightly less expense to a railroad company in carrying goods of the same quality and quantity by a single continuous carriage than by several disconnected and wholly independent carriages aggregating the same distance, because of the additional expense by reason of the more often loading and

unloading, and of the additional labor and the wear and breakage of cars and machinery by the more often switching and stopping and starting of cars, etc., in the latter instance; and we also concede that, as a matter of fact, where a railroad company has full loads for its cars in each direction, it may carry the same freight more cheaply than where it is obliged to run its cars empty or only partially loaded, in one direction, or only partially loaded in both directions, — and that for these and other like reasons affecting the actual expense of carriage to a railroad company, it may afford to carry the longer distance to or from the competitive point more cheaply, *pro rata*, than it can afford to carry the shorter distance to or from the non-competitive point. Discriminations made in good faith because of such differences in expense of carriage, and proportioned with reference thereto, are undoubtedly just, and not within the purview of the statute. But it devolves upon the railroad company relying upon such facts as a defense to a suit for unjust discrimination to prove them to the satisfaction of the court. A reduced or 'cut' rate of a railroad company simply to meet a reduced or 'cut' rate of a rival railroad company is manifestly not necessarily controlled or materially affected by any of these considerations." In *People v. Wabash etc. R'y Co.*, 104 Ill. 476, it was held that the Illinois act forbidding unjust discriminations by railroad companies is not limited in its application to freights carried from one point to another wholly within the state, but may apply as well where the carriage is from a point within the state to a point without the state. But in *McLean v. Charlotte etc. R. R. Co.*, 96 N. C. 1, it was held that a contract with a railroad company to carry freight from a place in North Carolina to a place within another state at a fixed price for the entire route was not embraced by the provision of the code of that state prohibiting unjust discriminations, but that such a contract was a matter affecting interstate commerce, the control of which is vested exclusively in Congress.

DISCRIMINATION BETWEEN EXPRESS COMPANIES. — In several cases decided in the United States circuit courts it was held that railroad companies are bound to allow express companies to do business on their roads, and to provide such conveyances, by special cars, or otherwise, attached to their trains, as are required for the safe and proper transportation of express matter, and they are bound to extend the use of such facilities on equal terms to all who are engaged in the express business. On appeal of three of these cases to the supreme court of the United States, viz., *St. Louis etc. R'y Co. v. Southern Express Co.*, *Memphis etc. R. R. Co. v. Southern Express Co.*, *Missouri etc. R'y Co. v. Adams Express Co.*, reported as *The Express Cases*, 117 U. S. 1, the decrees of the circuit courts were reversed. The majority of the supreme court, Miller and Field, JJ., dissenting, and Matthews, J., not participating, held that railroad companies are not required by usage, nor by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled; that they are not obliged by common law or by usage to do more as express carriers than to provide the public at large with reasonable express accommodation, and that they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains. But see *New England Express Co. v. Maine Cent. R. R. Co.*, 57 Me. 188, 2 Am. Rep. 31, and *Sandford v. Catwissa etc. R. R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667, in which it is held that a railroad company cannot give to one express company an exclusive right of transportation in its passenger-cars. In the former of these cases,

Appleton, C. J., in delivering the opinion of the court, said: "The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application. The defendants derive their chartered right from the state. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select from those who may apply some whom they will, and reject others whom they can, but will not, carry. They cannot rightfully confer a monopoly upon individuals or corporations. They were created for no such purpose. They may regulate transportation, but the right to regulate gives no authority to refuse, without cause, to transport certain individuals and their baggage or goods, and to grant exclusive privileges of transportation to others. The state gave them a charter for no such purpose."

CONSTITUTIONAL AND STATUTORY PROVISIONS. — In England, by statute, 17 & 18 Vict., c. 31, sec. 2, it is provided: "No such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." In this country, nearly all the states of the Union have provided, either in their constitutions or by statutes, that railroad companies shall not be permitted to make unjust discriminations. A few of these provisions are here given as examples: —

"No undue or unreasonable discrimination shall be made in charges for or in facilities for transportation of freight or passengers within the state, or coming from or going to any other state": Const. Ark. 1874, sec. 3, art. 17. "No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either by abatement, drawback, or otherwise": *Id.*, sec. 6.

"No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either by abatement, drawback, or otherwise": Const. Mo. 1875, art. 12, sec. 23. "It shall not be lawful in this state for any railway company to charge for freight or passengers a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance": *Id.*, sec. 12.

"Every railroad operating in the state shall furnish reasonable and equal facilities and accommodations to all persons engaged in express business for transportation of themselves, agents, servants, merchandise, and other property; for the use of their depots, buildings, and grounds, and for exchanges at points of junction with other roads": Rev. Stats. Me. 1883, c. 61, sec. 14.

"The rates shall be the same for all persons and for like descriptions of freight between the same points. All persons shall have reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise or other property, upon any railroad owned or operated in this state": Gen. Laws N. H. 1873, c. 163, sec. 2.

"If any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater compensa-

tion for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful": Laws Neb. 1887, c. 60, sec. 2.

"It shall be unlawful for any railroad corporation operating in this state to charge for the transportation of any freight of any description over its road a greater amount as toll or compensation than shall, at the same time, be charged by it for the transportation of an equal quantity of the same class of freight transported in the same direction over any portion of same railroad of equal distance": Code N. C. 1883, sec. 1966.

"No charge for the carriage of goods, merchandise, or property to or from any place or station shall be deemed reasonable within the meaning of this act which is in excess of the usual and established charge made by the same corporation or combination of corporations for the carriage of the like kind, class, and quantity of freight for any greater distance over their line or lines in the same direction": 16 Stats. S. C. 784.

"Charges for transportation on each class or kind of freight shall be uniform, and no unjust discrimination in the rates or charges for the transportation of any freight shall be made against any person or place on any railroad in this state; and it shall be *prima facie* evidence of an unjust discrimination for any railroad company to demand or receive from one person, firm, or company a greater compensation than from another for the transportation in this state of any freight of the same kind or class, in equal or greater quantities, for the same or a less distance. . . . Whether any alleged discrimination is unjust or not shall be a question of fact": Rev. Stats. Tex. 1879, art. 4257.

Under the North Carolina act, discrimination in freight tariffs by railroad companies means charging shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance: *Hines v. Wilmington etc. R. R. Co.*, 25 N. C. 434.

TOUSEY v. ROBERTS.

[114 NEW YORK, 312.]

LANDLORD ASSUMING TO OPERATE ELEVATOR FOR BENEFIT OF HIS TENANTS IS BOUND TO EXERCISE DUE CARE for their safety, and is liable to them for the negligence of his employees in operating the elevator.

ELEVATOR FOR CARRIAGE OF PERSONS IS NOT SUPPOSED TO BE PLACE OF DANGER, to be approached with great caution, but may be assumed to be, when the door is thrown open by an attendant, a place that may be safely entered without stopping to look, listen, or make a special examination.

WHETHER OWNER OF BUILDING SHOULD NOT HAVE EXERCISED SUCH SUPERVISION OVER IT as to make it impossible for a young boy, who was not his servant, to do acts from which the tenants of the building might have derived the impression that the boy was his servant, and was in

fact an attendant at the elevator therein, is properly left by the court to the jury to determine as a question of fact.

EXCEPTION WHICH DOES NOT POINT OUT WHEREIN COURT IS CONCEIVED TO HAVE ERRED in its refusal to charge as requested, and thus give an opportunity for correction, is unavailing.

ACTION for personal injuries. The opinion states the case.

Norman T. M. Melliss, for the appellant.

William H. Townley, for the respondent.

FOLLETT, C. J. In 1883, the defendant owned a house on West Fifty-sixth Street, in the city of New York, known as the Winfield, which was divided into apartments. The plaintiff's husband had a written lease from the defendant of an apartment on the fourth floor, in which the plaintiff and her husband dwelt. The usual mode of going to and from this apartment was by an elevator which was operated by the defendant for the accommodation of the occupants of the building. The elevator-shaft extended seven feet below the ground-floor. The door through which the car was entered from this floor was so constructed and fastened that it could be opened by persons standing in the hallway. Between six and seven o'clock in the afternoon of May 7, 1883, the plaintiff, accompanied by a lady, entered the hallway from the street, walked towards the elevator, and as she approached it, the door was thrown open, she passed through, and the car being above, she fell to the bottom of the shaft, sustaining external and internal injuries. This action is for the recovery of the damages sustained, and it is alleged in the complaint: 1. That the hallway on the ground-floor which led to the elevator was not lighted; 2. That the door through which the car was entered from the hallway was fastened so it could be opened from the hallway; 3. That defendant employed or permitted a boy to run the elevator who negligently opened the door and thereby invited the plaintiff to pass through when the car was in the upper part of the shaft.

It was conceded at the trial that at the time of the accident there was no artificial light in the hallway; but whether it was then so dark that a light was required was a disputed fact. It was also conceded that the door through which the car was entered from the hallway could be opened from the hallway, and that upon the occasion in question it was so opened by a boy by the name of Reilly, a younger brother of the person employed by the defendant to run the elevator.

Witnesses called by the plaintiff testified that young Reilly had run the elevator on many occasions before the accident; while the witnesses called by the defendant testified that he had never run it. The defendant insisted that the plaintiff contributed to the accident by failing to observe that the car was not in place; urging that if she had looked attentively she could have seen that it was absent, or if she had listened, that she could have heard it descending from above.

At the close of the plaintiff's case the defendant moved to dismiss the complaint, upon the ground that no negligence had been shown that was attributable to the defendant, or to any of his employees; and when both parties rested, the defendant asked the court to direct a verdict in his favor upon the ground above stated, and upon the further grounds that young Reilly was not defendant's employee, and that the plaintiff was guilty of contributory negligence in not looking before she walked through the door. Both motions were denied, and the defendant excepted. In this there was no error. The defendant assumed to operate the elevator for the benefit of his tenants, and he was required to exercise due care for their safety, and was liable to his tenant for the negligence of his employees in operating the elevator. The evidence was sufficient to sustain a finding that young Reilly had run the elevator on so many occasions that the plaintiff was justified in assuming that he was employed by the defendant in that service; and also to sustain a finding that this practice of young Reilly was known, or should have been known, to the defendant's son, who had the general supervision of the building, and to the engineer employed in and who superintended the building and the running of the elevators, with power to employ attendants. For their neglect the defendant is liable. And so, also, was the evidence sufficient to justify the jury in inferring that the hallway and elevator should have been lighted. The door to the car of the elevator being thrown open by a boy who had been accustomed to throw it open, it was not, as a matter of law, contributory negligence in the plaintiff to pass through the door without stopping to look and listen. An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger, to be approached with great caution; but on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen, or make a special examination.

The court instructed the jury that there was no evidence that young Reilly was employed by the defendant, and then said: "But though he was not such a servant, it may be a question for you whether the defendant should not have exercised such supervision over the building as to make it impossible for that brother to do acts from which the tenants might have derived the impression that he was such a servant." To this the defendant excepted. The court did not go beyond the law in directing the jury to determine, as a question of fact, whether the defendant should not have exercised sufficient supervision over his building to have prevented this young and unauthorized boy from acting as, and creating the impression that he in fact was, an attendant at the elevator.

The case shows that the defendant requested the court to charge six propositions, which are set forth, but it does not show what answer the court made or how it disposed of them. But two exceptions were taken to the charge, one to the instruction as to the supervision of the building, which has been discussed, and the following: "Defendant's counsel also excepts severally to each and every refusal of the court to charge each and every proposition requested by defendant's counsel." It is urged that the refusal to charge the first and second of the six propositions was error. It is sufficient to say that the case does not show that the court refused to charge any one of the requests. The exception above quoted did not point out wherein defendant's counsel conceived the court to have erred, and thus given an opportunity for correction, for which reason it is unavailing: *Walsh v. Kelly*, 40 N. Y. 556; *Regua v. City of Rochester*, 45 Id. 129; 6 Am. Rep. 52; *Harwood v. Keech*, 4 Hun, 389; 6 Thomp. & C. 665; *Beaver v. Taylor*, 93 U. S. 46.

No exceptions were taken to the rulings admitting or excluding evidence, and the record disclosing no error, the judgment should be affirmed, with costs.

NEGLIGENCE IS ORDINARILY A QUESTION OF FACT FOR THE JURY: *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; *ante*, p. 617, and note, with the cases therein cited.

LANDLORD AND TENANT. — A landlord is answerable where an opening in a sidewalk is left unguarded by a janitor in his employ who has general charge of the premises and of such opening, though the building was rented to tenants in flats, and the same janitor was employed by the tenants to deliver coal to their rooms: *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

APPEAL. — Error must always be affirmatively shown: *Mills Co. etc. Bond v. Perry*, 72 Iowa, 15; 2 Am. St. Rep. 228, and note 230; *Aspinwall v. Sabin*, 22 Neb. 73; 3 Am. St. Rep. 258; *Bockenstedt v. Perkins*, 73 Iowa, 23; 5 Am. St. Rep. 652; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525; 5 Am. St. Rep. 697, and note 699.

PERKINS v. STIMMEL.

[114 NEW YORK, 359.]

OBJECTION TO LEGAL CAPACITY OF GENERAL GUARDIAN OF INFANT TO SUE in his own name, as such guardian, for an injury to his ward's estate, is waived, if not taken by demurrer or answer.

ACTION AT LAW AGAINST SURETIES ON BOND OF GENERAL GUARDIAN cannot be maintained until proceedings for an accounting have been had against such guardian, and his default has been established therein; and this rule applies although the guardian has died, since his personal representatives may be required to account, and before the sureties can be sued, proceedings in the surrogate's court must at least establish the fact that none of the infant's property has come into the administrator's possession. In the absence of a decree to that effect, the presumption is that the administrator has possession of the infant's estate, and until it is otherwise established, a *devastavit* will not be presumed.

ACTION on a guardian's bond. The opinion states the case.

Edward P. Wilder, for the appellant.

George Putnam Smith, for the respondent.

POTTER, J. The action was brought by the general guardian of an infant to recover from the sureties on a bond of a former guardian, now deceased, the amount of her estate which had been, as alleged, wholly converted to his own use by such former guardian.

The bond on which this action is predicated was given on or about the 10th of April, 1882. The plaintiff, at the time of the giving of such bond by the defendants, was an infant, and was, at the time of the commencement of this action, an infant under the age of twenty-one years, and this action is brought in the name of Edward C. Perkins, as the general guardian of one Emily L. Middleton, the ward of the former general guardian.

The complaint, in substance, alleges that one Wiley, who was appointed by the surrogate-general guardian of said Emily L. Middleton, gave a bond in the usual form. The condition of such bond was, that the said James Wiley should faithfully discharge the trust reposed in him, and obey all lawful directions of said surrogate touching his trust as general guardian

of the infant, Emily L. Middleton, and in all respects render a just and true account of all moneys and other property received by him, as guardian, whenever he should be required to do so by a court of competent jurisdiction.

The proof shows, and the complaint alleges, that after such appointment of said guardian, and his qualification as such, there came into his hands, as assets or property of the infant, the amount of some sixteen thousand dollars, consisting of cash, stocks in corporations, United States bonds, etc. The allegation of the complaint is, that said Wiley misappropriated and converted to his own use such assets.

Passing by, for the present, the proof and objections and exceptions to the taking of the proof, the first question that arises is upon the capacity of the plaintiff, as general guardian of the estate of Emily L. Middleton, to maintain this action in his own name. It should be stated, in addition to the facts above, that after the appointment and qualification of said Wiley as guardian, and the giving of the bond on which the action is brought by the defendants Stimmel and McCreery, as his sureties therein, said Wiley, after making two inventories and filing them with the surrogate, died; that there has been no letters of administration taken out by any of his family, but letters of administration were taken out by the public administrator of the city of New York.

After the making said inventories and Wiley's death, the present plaintiff was duly appointed the general guardian of the estate of said Emily L. Middleton, in the place of the former guardian, deceased. There are two questions arising in this case, and they are distinctly raised,—first at the close of the trial, and have been insisted upon through the appeal to the general term, and are still insisted upon on this appeal. As before indicated, the first of these questions is the right of Edward C. Perkins, plaintiff in this action, to maintain the same in his own name as general guardian against the sureties of the former guardian. The question has arisen from time to time in the supreme court and in other courts of record in this state, and has been variously decided,—some of them holding that this action may be properly maintained in the name of the general guardian, others holding that the action should have been brought in the name of the infant, Emily L. Middleton, by a guardian *ad litem*, duly appointed.

In *Thomas v. Bennett*, 56 Barb. 197, it was held that a general guardian appointed by the surrogate can maintain an

action in his own name, as such guardian, to recover a debt due to his ward. Judge Foster, writing the opinion of the general term, reviews a great number of cases in the supreme court and in the old courts of chancery, and reaches the conclusion stated as above. He seems to have reached that conclusion through analogy to similar cases brought by a committee of an habitual drunkard or lunatic, based upon the principle that such guardian as well as such committed is a trustee of an express trust, and has absolute dominion over the personal property of the ward, with power to sell and confer good title upon the purchaser, to settle any debts and claims belonging to his ward, and to collect the distributive share of the ward in the estate of deceased persons. It was held in the same manner in *Hauenstien v. Kull*, 59 How. Pr. 24. That case was followed and the same conclusion reached in the case of *Coakley v. Mahar*, 36 Hun, 157, Judge Follett writing the opinion of the court, which was concurred in by judges Hardin and Boardman. The question was first practically raised in this court in the case of *Segelken v. Meyer*, 94 N. Y. 478. In that case, the action was brought by an infant by his guardian *ad litem*, and the action was to recover the property belonging to the infant. The infant, at the same time, had a general guardian; and the question presented was, whether the action should not have been brought in the name of the general guardian, or in the name of the infant by his guardian *ad litem*. The court, in the opinion in that case, reviews numerous cases upon this subject, and especially the case above cited (*Thomas v. Bennett*), and comes to the conclusion that an action to recover money or personal property belonging to an infant is properly brought in his own name by his guardian *ad litem*. The general term, in the opinion given in this case, after discussing it at some length, use this language: "That probably it would have been better practice to have brought the action in the name of the infant by her guardian *ad litem*, but there are authorities which allow the suit in its present form"; "the question has no substantial merits"; "the cause of action is precisely the same in either case, and the obligation and results are the same if a recovery be had"; "the guardian, in fact, recovers as such in either action, and takes the property as guardian, and is bound to account to the infant for the judgment and its proceeds."

In reviewing these various cases upon this question, I have been impressed with what I think is a plain theory of the

code, and of the practice upon this subject, viz., that all actions brought by an infant should be brought in the name of the infant by a guardian *ad litem*. Such has been the character of the changes which have been made in respect to actions brought by infants, and that is indicated by the changes in relation to real estate, which formerly were brought by a guardian *in socage*, and which is now required to be brought in the name of the infant by a guardian *ad litem*, in accordance with recent amendments to section 1686 of the code, having relation to actions in respect to the realty of infants.

If this was the only question in the case, and I had not come to the conclusion that there must be a new trial or the judgment must be reversed on another ground, I should be disposed to hold that this action was properly brought in the name of the general guardian, in accordance with various decisions which have been made from time to time on that subject. But having reached the conclusion that this judgment must be reversed, and inasmuch as it is the plain theory of the code, and the practice now, that all actions brought by infants should be brought in their name by a guardian *ad litem*, I am inclined to hold that the action should have been brought in the name of the infant by her guardian *ad litem*, and such is and will be the better practice, I think. But while I have reached that conclusion, as a general rule of practice, it cannot avail the defendant in this case, as the objection was not raised by demurrer or answer, as shown by the opinion of my brother Brown in this case.

I have not, in the consideration of this question, overlooked a section of the code which is cited upon the brief of counsel, and that is section 2608, but that section is especially designed for the remedy to be pursued in case where letters granted by a surrogate appointing one person general guardian have been revoked and a subsequent guardian appointed in his place. I do not think a fair construction of that section interferes with the general proposition that an action should be brought in the name of the infant by a guardian *ad litem*.

The grave question in this case is, whether an accounting is necessary before an action at law can be maintained upon the bond given by the sureties on the occasion of their principal being appointed general guardian. That question has been left in a good deal of doubt for some time, and until a recent decision in the court of appeals: *Hood v. Hood*, 85 N. Y. 561; 73 Id. 574.

This bond is substantially as was required under the Revised Statutes by the act of 1837 in regard to administrators and guardians, which statutes have been substantially re-enacted in and from various sections of the code. The conditions of a bond given by an administrator and the conditions of a bond given by a general guardian are the same in terms so far as the condition or liability of the sureties is concerned. They differ in this, that while the condition is the same, one runs in terms to the people, and the other runs to the ward by name, notwithstanding the obligations that are assumed by the sureties for the appointment of an administrator and general guardian are the same. It has been held for a long time that sureties upon a bond given for the faithful performance of an administrator could not be sued at law on the bond, and could not be sued until there had been an accounting before a surrogate, or formerly, in chancery, a decree or order made establishing the default and extent of the deficiency. There are cases to the same effect in regard to the bond of a general guardian, that before an action can be brought upon his bond at law, there should be the same kind of an accounting, decree, or order determining the same essential facts as in the case of an administrator. The question remained in doubt in respect to an action upon an administrator's bond until the decision in the case of *Hood v. Hood*, 85 N. Y. 561, above referred to. In the action of *Hood v. Hood*, the plaintiff sought to compel an accounting by an executor who had been required to give security, and that security was in the form of an ordinary bond given by an administrator to determine the amount of funds that had been misapplied and converted to the executor's use, and at the same time and in the same action, to compel his sureties to pay the sum which might be found owing from him, and which could not be collected from him. This case reviews a great number of cases arising under the obligations of an administrator and his sureties to the estate he represents; and inasmuch as the bond of the executor is required by statute, and as executed in that case, it was held the same rules apply to bonds of an executor as to bonds of an administrator. If the same rules apply to executors or administrators, whose bonds are the same, and the same as a guardian's bond, why do they not apply to the general guardian's bond? The result of the authorities is, that no action at law can be maintained against the sureties of an executor or administrator except in case of disobedience of some order of

the surrogate, and after he should have authorized the prosecution of the bond. Now, inasmuch as the condition and purposes of a general guardian's bond are the same as an administrator's bond, we should expect the same conditions which have been decided to be necessary before an action can be brought upon an administrator's bond, are also necessary to be observed before bringing an action upon a general guardian's bond.

The court of appeals have reiterated that doctrine in regard to administrators' bonds, in the case of *Haight v. Brisbin*, 100 N. Y. 219. We find in other courts that there are several cases, and more especially the case of *Bieder v. Steinhauer*, 15 Abb. N. C. 428, where it was distinctly held by Judge Rumsey that an action cannot be brought upon a bond given on the appointment of a general guardian for an infant until there had been an accounting and a decree in the same manner and of the same character as we have before seen is required prior to suing sureties upon an administrator's bond. While this is a general rule, I am satisfied in respect to the sureties upon an administrator's bond, and upon the bond given by sureties upon the appointment of a general guardian, there have been intimations that in some cases that there may be exceptions to the rule, yet I find no case where extraordinary circumstances have taken the case out of the general rule, nor what extraordinary circumstances would suffice to take a case out of the rule. In the case under consideration, there is no allegation of extraordinary circumstances or peculiarities; but the action is brought against the sureties upon the bond, and the other allegation that the bond has been broken and forfeited by reason of waste or devastation of the estate committed by the general guardian.

I am therefore forced to the conclusion that this judgment cannot be sustained. However apparent it is that a great wrong, so far as the evidence discloses, has been done to the plaintiff's ward, her remedy is not gone; but it may subject her to the costs of this action in order to obtain her rights in another action more properly brought.

My conclusion, therefore, is, that this judgment must be reversed, and a new trial granted.

BROWN, J. The appellant makes two points against the judgment recovered in this action: 1. That the plaintiff cannot maintain the action, but that it should have been brought

in the name of the infant; 2. That an action at law cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian. The first point must be deemed to have been waived, it not having been taken by demurrer or answer: Code, sec. 499.

The appellant argues that the objection is one going to the cause of action, and cites numerous authorities in support of his position. None of them sustain him. All of them except one arose upon a demurrer to the complaint. The only one in which the question was raised upon the trial was *Bank of Havanna v. Wickham*, 16 How. Pr. 97. In that case, the general term held that the capacity of the plaintiff to sue was independent of the cause of action, and that the objection that the action could not be maintained in the name of the Bank of Havanna, not having been taken by demurrer or answer, was waived.

This case, *sub nom. Bank of Havanna v. Magee*, was reversed by the court of appeals,—20 N. Y. 355,—but upon another ground, the court saying: “The objection is not that the plaintiff has not capacity to sue, but that no person, natural or artificial, is named as plaintiff. Certain persons, as infants, idiots, lunatics, etc., cannot sue, except by guardians, next friends, committee, etc. This, I think, is what the provision [of the code] refers to.”

Numerous cases can be cited holding directly to the contrary of the appellant's contention. In *Phoenix Bank v. Donnell*, 40 N. Y. 414, it is said that the objection that the facts stated in the complaint do not constitute a cause of action has no application to the question as to the capacity of the plaintiff to sue.

In *Palmer v. Davis*, 28 N. Y. 242, it was held that, previous to the amendment of section 114 of the code in 1857, an objection that a wife has no capacity to sue except by a next friend, if not taken by demurrer, was waived. In *Fulton Fire Ins. Co. v. Baldwin*, 37 Id. 648, it was held that an objection that the complaint does not show the plaintiff's capacity to sue cannot be raised by a demurrer taken on the ground that the complaint does not state facts constituting a cause of action: See also *Town of Pierrepont v. Lovelass*, 4 Hun, 696; *Barclay v. Quicksilver Min. Co.*, 6 Lans. 25; *Mosselman v. Caen*, 21 How. Pr. 248, opinion by Clerke, J. Section 488 of the code distinctly specifies as one of the grounds of demurrer

that the plaintiff has not legal capacity to sue, and this would be wholly unnecessary if the question could be raised under the objection that sufficient facts were not stated in the complaint to constitute a cause of action. The precise objection now made appeared on the face of the complaint. The care and management of infant estates are subjects of statutory regulations, as are also the manner and form in which actions by and against infants must be prosecuted.

The question in this case was, Can a general guardian sue in behalf of his ward for injury to his ward's estate? That is, has he the power and authority in law, or, in the language of the code, "the legal capacity," to maintain such an action? This was a pure question of law, and could have been raised by demurrer. Whether the guardian's bond was made to the people or to the infant was of no consequence, nor am I able to perceive that the plaintiff could have acquired any rights under section 747 or 814 of the code which would have enabled him to maintain the suit, and the allegation of the complaint showed that no right to maintain the suit was claimed under section 2608.

I think, therefore, that the objection that the plaintiff could not maintain the suit was waived. The judgment must, however, be reversed upon the second ground stated. This question was very fully examined in the case of *Hood v. Hood*, 85 N. Y. 561, in which it was sought to charge the sureties for their principal's default on a bond given by a non-resident executor. It was there decided, after a full review of all the authorities, that the default of an executor or administrator must be established in a proper proceeding against him before the sureties can be prosecuted upon the bond. To the same effect is *Haight v. Brisbin*, 100 Id. 219. The respondent has endeavored to distinguish the cases cited from the one under consideration, but I think the reason of the rule applies with equal force to actions upon guardian's bonds. It was so decided in *Salisbury v. Van Hoesen*, 3 Hill, 77, and in *Stillwell v. Mills*, 19 Johns. 303, and both of these cases were cited with approval in *Hood v. Hood*, *supra*. The fact of the death of the former guardian cannot take the case out of the rule, as his personal representatives may be required to account: Code, sec. 2606. The learned counsel for the respondent has cited cases holding that the administrator of the deceased guardian can only be compelled to account if he has property of the ward in his hands: *Maze v. Brown*, 2 Demarest, 217; *Schofield v. Adriance*,

2 Id. 486. These decisions were made before the amendment to section 2606, in 1884: Ch. 399. Subsequent to that amendment, the learned surrogate of New York County entertained an application to compel an executor of a deceased executor to account, and his decree was sustained by the general term: *In re Fithian*, 44 Hun, 457. In that case it was held that the purpose of the amendment was to develop all that the executor knew or could learn about the trust estate and in reference to it. We concur in this opinion. Undoubtedly no decree could be made against the administrator if the petition to the surrogate failed to allege or the proof failed to show property of the infant in the administrator's possession. But before the sureties on the bond can be sued, proceedings in the surrogate's court must, at least, establish the fact that none of the infant's property has come into the administrator's possession. In the absence of a decree to that effect, the presumption would be that the administrator has possession of the infant's estate, and until it is otherwise established, a *devastavit* will not be presumed.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

GUARDIAN AND WARD. — The liability of a surety on a guardian's bond is fixed by proof that the guardian never paid over to his ward the sum which the court ordered him to pay over, and that there has never been any settlement between the guardian and ward: *Gillet v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587. But an action will not lie against a guardian's sureties till there has been a settlement of the guardian's account with the court, and a failure to pay as ordered by the court: *Gillespie v. Sec*, 72 Iowa, 345.

LEONARD v. POOLE. -

[114 NEW YORK, 371.]

ACTION TO ADJUST DIFFERENCES OF PARTIES WHO HAVE ENGAGED IN UNLAWFUL PLOT to advance the price of an article of food will not be entertained by the courts.

PERSONS KNOWINGLY PROMOTING AND PARTICIPATING IN CARRYING OUT CRIMINAL SCHEME ARE ALL PRINCIPALS, and the fact that one of them acts, in some respects, in subordination to the others, and is to profit less than the others, or not at all, by the consummation of the scheme, does not render him less a principal.

LAW-BREAKERS ARE NOT ENTITLED TO AID OF COURTS to adjust differences arising out of and requiring an investigation of their illegal transaction.

ACTION for an accounting. Between August 13, 1879, and February 9, 1880, the defendants, Elmore A. Kent and Abram Poole, were partners under the firm name of E. A. Kent & Co., buying and selling produce on commission at New York and Chicago. During the same period, Henry C. Butcher, Howard Butcher, and Henry P. Darlington were partners under the name of Washington Butcher's Sons, carrying on the same business at Philadelphia and Chicago. Between the same dates, Darius Miller and Nathan G. Miller were partners under the name of D. & N. G. Miller, engaged in the same business at New York and New Britain. And between the same dates James R. Keene was engaged in business in New York. The above-named firms and Keene executed and delivered to E. A. Kent & Co. this contract, on the day of its date:—

"The undersigned, each for himself, and not for the others, hereby agree to form a pool or combination for the purpose of buying and selling one hundred and twenty thousand tierces of lard, and to receive and pay for the amounts set opposite their respective names, to wit, James R. Keene, forty thousand tierces; Washington Butcher's Sons, forty thousand tierces; D. & N. G. Miller, twenty thousand tierces; E. A. Kent & Co., twenty thousand tierces; and the said parties, each for himself, authorizes and empowers E. A. Kent & Co., in consultation and with the approval of James R. Keene, N. G. Miller, and Henry C. Butcher (parties hereto) to purchase and sell at their discretion, or that of a majority of them, the aforesaid quantity (one hundred and twenty thousand tierces), each agreeing to be responsible for the amount set opposite their respective names, and no more; any profit or loss arising from said purchases and sales to be divided *pro rata* among the subscribers hereto; and the said parties hereby agree to furnish, on demand, to E. A. Kent & Co., a margin of not less than one dollar per tierce for each and every tierce purchased, and further additional margins, if required, by any decline in the market value thereof. And whereas James R. Keene is the present owner of fifty thousand tierces of lard, Washington Butcher's Sons of forty thousand tierces, and D. & N. G. Miller of sixteen thousand tierces, now, for and in consideration of the sum of one dollar to each of the aforesaid parties paid by E. A. Kent & Co., and for other valuable considerations, receipt of which is hereby acknowledged, the aforesaid

James R. Keene, W. Butcher's Sons, and D. & N. G. Miller agree and bind themselves to hold, tie up, and effectually withdraw from market, so that the same cannot be sold during the continuance of this agreement without the written consent of all the parties hereto the aforementioned number of tierces of land, to wit, James R. Keene, fifty thousand; W. Butcher's Sons, forty thousand; D. & N. G. Miller, sixteen thousand; and from time to time, when demanded by E. A. Kent & Co., to furnish the said E. A. Kent & Co. with evidence satisfactory to them that the said number of tierces of lard are withheld from market and in possession of the aforesaid parties respectively; and it shall be the duty of said E. A. Kent & Co. to obtain such evidence of possession whenever required by either of the parties hereto. It is further understood and agreed that this agreement, in all its provisions and requirements, shall remain in full force and effect until the aforesaid one hundred and twenty thousand tierces of lard have been accumulated and sold, unless sooner dissolved by the consent in writing of all the parties hereto.

"NEW YORK, August 18, 1879.

"James R. Keene..... 40,000 tierces of lard.

"Washington Butcher's Sons..... 40,000 tierces of lard.

"D. & N. G. Miller..... 20,000 tierces of lard.

"E. A. Kent & Co..... tierces of lard."

The court found that at the date of this contract it was agreed between the signers that E. A. Kent & Co. were not to be interested as principals in the transaction, but were to make the purchases and sales as brokers. It also found that shortly after the above contract was executed, the following contract was executed and delivered by the signers thereof to E. A. Kent & Co., the existence thereof being unknown to James R. Keene:—

"For and in consideration of the payment to us, the undersigned, one half each, by E. A. Kent & Co., of any and all profits realized from the purchase and sale of twenty thousand (20,000) tierces lard, or any part thereof, E. A. Kent & Co.'s shares of a total of one hundred and twenty thousand (120,000) tcs. lard, as set forth in a certain agreement made of the thirteenth day of August, by and between E. A. Kent & Co., D. & N. G. Miller, Washington Butcher's Sons, and James R. Keene, we, the undersigned, respectively, D. & N. G. Miller and Washington Butcher's Sons, hereby guarantee and

assume all loss, as against said E. A. Kent & Co., on ten thousand (10,000) tcs., each, arising from said transactions.

"WASHINGTON BUTCHER'S SONS.

"D. & N. G. MILLER.

"Witness: E. A. KENT."

To carry out their contract, Keene, W. Butcher's Sons, and D. & N. G. Miller furnished large sums of money to E. A. Kent & Co., with which, from time to time, between the date of the contract and January 31, 1880, they bought and sold, on the produce exchanges of New York and Chicago, futures and options in lard; and also bought large quantities of lard, some of which was, from time to time, sold. These sales were made so as to cause, and for the purpose of causing, the price of lard to fall, so as to enable the pool to purchase it at satisfactory prices, withdraw it from the market, and thereby greatly increase the market price. Many purchases and sales were made upon the approval of James R. Keene, N. G. Miller, and Henry C. Butcher, or a majority of them, but many were made by E. A. Kent & Co. without such approval, and upon their own judgment. During the period of these transactions, E. A. Kent & Co., from time to time, delivered to James R. Keene statements of the purchases and sales made for the parties interested. Many of the purchases and sales entered in these statements did not describe actual transactions, but described alleged sales by themselves to themselves, and alleged purchases by themselves from themselves, upon which alleged transactions commissions were charged. These facts were not disclosed by the statements, nor in any other way. On the 31st of January, 1880, the defendants furnished to Keene a summary statement of the alleged transactions, which showed \$133.09 due from them to him, and on the 6th of February, 1880, they sent him a check for this amount; and on February 9, 1880, they sent him a check for \$127.95, an alleged difference in interest. Keene retained and collected these checks, but did not accept them in settlement. The court found that these statements were fraudulent, and that a much larger sum was due to Keene from the defendants; but as the parties had engaged in an unlawful conspiracy, the court refused to adjust their differences, and dismissed the complaint, with costs. The general term affirmed the judgment, and the plaintiff appealed.

Stephen H. Olin, for the appellant.

Joseph H. Choate, for the respondent.

FOLLETT, C. J. When the transactions out of which this action arose were being carried on, the statutes of this state provided that if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor: 2 R. S. 692, sec. 8, subd. 6. The same provision is contained in the Penal Code, section 168. The scheme entered into by the parties to the contract of August 13, 1879, was an indictable misdemeanor: 2 R. S. 692, sec. 8; *People v. Fisher*, 14 Wend. 9; 28 Am. Dec. 501; *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434; 49 Am. Dec. 282; *Arnott v. Pittston and Elmira Coal Co.*, 68 N. Y. 558, 565; 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173. The scheme which the parties to the contract for a time pursued, and sought to consummate, was identical with the one described in the contract, and equally criminal. That Keene, Washington Butcher's Sons, and D. & N. G. Miller agreed to engage, and actually engaged, in an unlawful plot to advance the price of lard cannot be successfully denied, and the courts of this state will not entertain an action to adjust their differences. This proposition is well settled; and we do not understand that the learned counsel for the appellant gainsays it, nor does he assert that the rule would not be applicable to a case arising between those parties and out of these transactions. The learned counsel for the appellant insists that Kent & Co. were not principals, but were mere agents for the principals, and that they cannot avoid payment upon the ground that the transactions were illegal. When persons knowingly promote and participate in carrying out a criminal scheme, they are all principals; and the fact that one of the parties acts in some respects in subordination to the others, and is to profit less than the others, or not at all, by the consummation of the scheme, does not render such person less a principal.

This rule is elementary, and does not require elaboration or the citation of authorities. Throughout the period covered by the transactions, these defendants bought and sold lard and futures and options in lard, and actively engaged in the attempt to carry out the unlawful enterprise. If, at the close of their transactions, Keene and his associates had been found to be owing Kent & Co., we think it very clear that the illegality of the enterprise would have been a perfect defense to an action brought by Kent & Co. to recover the sum due: *Bartlett v. Smith*, 13 Fed. Rep. 263; *Cobb v. Prell*, 15 Id. 774;

Irwin v. Williar, 110 U. S. 499. In the case last cited, Mr. Justice Matthews, in speaking for a unanimous court, said: "In *Roundtree v. Smith*, 108 U. S. 269, it was said that brokers who had negotiated such contracts, suing, not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction": 110 U. S. 509.

Several cases have been cited holding that money or property deposited with a third person, which was derived from or through an unlawful enterprise, may be recovered; and that the illegality of the transaction out of which the money or property arose cannot be successfully asserted as a defense by a mere agent or depository. This rule is well settled, but it is not germane to this case. Other cases are cited holding that when the parties to an illegal transaction have accounted, as between themselves, and agreed that a definite sum belongs to each, that an action may be maintained upon the accounting or new promise, and the sum, once admitted to be due, recovered. Admitting these cases to be well decided, they do not aid the appellant. These parties have had no accounting. No admission has been made that a specified sum is due to any one of them. No promise has been made since the completion of the illegal scheme upon which a recovery is sought. On the contrary, this action is for an accounting between the parties. It is alleged in the complaint that the amount which the plaintiff is entitled to recover is unknown, and can only be ascertained by an investigation of the illegal transactions between the parties. The judgment prayed for is: "That an account may be taken of all the dealings and transactions,

purchases and sales of lard made and conducted by said defendants E. A. Kent & Co., under the agreement hereinbefore mentioned," etc.

The relief sought would require the court to investigate all of the various transactions of these parties, from the beginning to the end of their unlawful enterprise, and adjust the differences between them. This is precisely what courts have always refused to do. The fraud which the trial court found was practiced by these defendants upon their associates cannot be too strongly condemned, but courts are not organized to enforce the saying that there is honor among law-breakers, and the desire to punish must not lead to a decision establishing the doctrine that law-breakers are entitled to the aid of courts to adjust differences arising out of and requiring an investigation of their illegal transactions.

The judgment should be affirmed, with costs.

PRINCIPALS.—All persons are principals who are guilty of acting together in the commission of an offense: *Phillips v. State*, 26 Tex. App. 228; 8 Am. St. Rep. 471; *Spies v. People*, 123 Ill. 1; 8 Am. St. Rep. 320; *Commonwealth v. Campbell*, 7 Allen, 541; 83 Am. Dec. 706; *Commonwealth v. Gannett*, 1 Allen, 7; 79 Am. Dec. 693; *Lowell v. Boston etc. R. R. Co.*, 23 Pick. 24; 84 Am. Dec. 23; *Hawkins v. State*, 13 Ga. 322; 58 Am. Dec. 517.

ILLEGAL CONTRACTS.—Parties cannot be heard who ask relief from violation of law; they are left where their conduct places them, being *in pari delicto*: *Schmidt v. Barker*, 17 La. Ann. 261; 87 Am. Dec. 527, and note 532.

CONTRACTS AGAINST PUBLIC POLICY, AS AFFECTING MARKETS.—Contracts made for the purpose of enabling defendants to have a monopoly of the market, and to control prices, are against public policy and void: *Arnott v. Pittston etc. Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190. Combinations to keep up wages are undoubtedly injurious to trade in the purview of a statute punishing conspiracies to do any act injurious to trade or commerce: *People v. Fisher*, 14 Wend. 9; 23 Am. Dec. 501, and note 507-512; *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258, and note; compare also *Stanton v. Allen*, 5 Denio, 434; 49 Am. Dec. 282, and note 286.

RUGGLES v. AMERICAN CENTRAL INSURANCE CO.
OF ST. LOUIS.

[114 NEW YORK, 415.]

ORAL AGREEMENT FOR INSURANCE IS BINDING ON COMPANY, WHEN. — Where written application for insurance is made to and filed with the agents of the company, who orally agree to insure from the date of the application, provided the company is not already on the risk, there is a complete and valid contract binding from the date of the conversation, although the premium be not paid, if a usage of the business to extend a credit to the broker for the premium until the end of the month is shown.

AUTHORITY OF AGENT CONTAINED IN LETTERS SENT TO HIM DATES FROM MAILING OF THE LETTERS.

LETTER STATING THAT "COMMISSION OF AUTHORITY AS AGENTS OF THIS COMPANY IN THE CITY OF BROOKLYN" had been forwarded by the writer, an insurance company, to the persons addressed, constitutes the latter the general agents of the company.

GENERAL AGENT MAY BIND HIS PRINCIPALS BY ACT CONTRARY TO HIS SPECIAL INSTRUCTIONS, if such act be within the scope of his authority.

ACTION ON a contract of insurance. The opinion states the case.

J. Stewart Ross, for the appellant.

A. C. Aubery, for the respondent.

BROWN, J. The court properly submitted to the consideration of the jury the question whether there was a binding agreement for insurance between the plaintiff's broker and the firm of Sedgwick and Hammond.

The testimony of the witness Barker was positive that the agreement was full and complete. Written application for the insurance, specific in all its details, had been filed with Sedgwick and Hammond, and the premium upon the risk was agreed upon, and there was evidence that the usage of the business was to extend a credit to the broker for the premium until the end of the month. As to the oral agreement, the evidence of this witness was, that, after Hammond had shown to him the letter from the company appointing his firm agents, and had stated that he "would bind the risk, provided the company was not on," he said to Hammond, "It is understood that the policy is binding, provided the company is not on the risk," and Hammond replied, "Yes." Asked, "When it was binding from," he answered, "From the sixteenth; from that time; from that conversation."

If this evidence was to be credited, it justified the inference of a complete binding agreement from the date of the

conversation. It was for the jury to draw the inference, and such a contract, if made, was a valid agreement for insurance upon which a recovery could be had: *Ellis v. Albany Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 405. A more serious question is presented as to whether the agreement thus made was binding upon the company.

At the close of the testimony the counsel for the defendant asked the court to dismiss the complaint, upon the ground that it appeared that the letter appointing Sedgwick and Hammond agents for the defendant limited them against insuring special risks, and risks within what was called "the shore line," which motion was denied, and to such denial defendant excepted.

The court was also asked to charge the jury that the plaintiff's premises were within the shore line; and also, if the jury should find that the risk was a special risk, that the agents had no authority to bind the defendant, and it was not liable.

Both requests were refused, and defendant excepted to each refusal. The location of the shore line was a disputed fact on the evidence. By the map called Higginson's map, the plaintiff's property was within the line. According to the location of the line by other witnesses, it was not. The determination of this fact, if it was a material one, was properly left to the jury. No question can arise on this appeal upon that branch of the case. The request to charge that if the jury should determine that the risk was special, the defendant was not liable, raised no other or different question than that presented by the motion to dismiss the complaint, as the risk was conceded to have been a special one, and the jury would have been bound so to find. The request was, therefore, equivalent to asking for a direction of a verdict for defendant. The point of the appellant's contention was, that the court should have decided upon the letter, which contained the agent's delegation of authority, that they possessed no power to bind the defendant upon a special risk, and this question is the most serious one presented upon this appeal. It may be conceded that the commission of authority had not, at the time of making the agreement, reached the agents. It had, however, been mailed from St. Louis, as the letter of the secretary of the company, dated October 13th, refers to it as having been forwarded by mail on that day. It may also be conceded that it did not reach the agents until October 20th,

the day after the fire, as Hammond in his letter to the plaintiff, under date of October 21st, speaks of the agents not having power to bind the company "until yesterday"; and Sedgwick testified that the two letters introduced in evidence were the only communications they had received from the company with reference to their acting as agents prior to the fire, which occurred on October 19th. The evidence upon the question of power is therefore to be found entirely in the two letters last mentioned. The first of these letters bears date October 11th, and was written to Sedgwick and Hammond by Mr. Van Valkenburgh, a general agent of the company. In it he says: "If your appointment is confirmed, your jurisdiction will be the city of Brooklyn, outside the shore line, but we shall expect you to write no large risks for us until you know for certain that we are not in through our New York office. As we are now on all Brooklyn specials of any size that we will write, please do not undertake to write any specials for us at present." The second letter was written by the secretary of the company from St. Louis, dated October 13th, and addressed to Sedgwick and Hammond. It states: "We take very great pleasure in forwarding to your address by mail to-day a commission of authority as agents of this company in the city of Brooklyn. We deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency, as our Mr. Van Valkenburgh has written you upon that subject," etc. Whatever authority the agents had they derived from these letters. The risk was a special one, and so admitted by the plaintiff upon the trial.

Was authority to insure such a risk withheld from the agents? We do not so interpret the letters. It is true that Van Valkenburgh wrote that the agents should not write any large risks until they knew that the company was not on through their New York office, and should not undertake to write any specials for the company, but this limited authority is not confirmed in the letter from the company. In that letter, the authority is broadly stated to be "agents of the company in the city of Brooklyn." There was no exception in the territory named, nor limitation as to the character of the risks to be insured. The other expression in the letter, that "we deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency, as our Mr. Van Valkenburgh has written upon that subject," does not in any way limit the agents' power. Its plain reference is to the man-

ner of conducting the business, and not to the authority to be exercised by the agent. That this view is the one entertained by the agent is plain from Hammond's letter to the plaintiff, under date of October 21st, in which he places his denial of the existence of an agreement to insure on the fact that they had not at the date of the alleged agreement received their commission of authority, and not at all upon the ground that such a contract was in excess of their power.

We think, therefore, that the letter of October 13th, fairly interpreted, constituted Sedgwick and Hammond general agents of the company; and that the utmost that could be claimed from the direction contained in Van Valkenburgh's letter, which I have quoted, was that they were instructions for the guidance of the agent, which would in no way affect contracts with third parties having no notice or knowledge of such instructions.

A general agent may bind his principals by an act within the scope of his authority, although it may be contrary to his special instructions: *Story on Agency*, sec. 733; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Lightbody v. North American Ins. Co.*, 23 Wend. 18; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322. In *Walsh v. Hartford Fire Ins. Co.*, *supra*, the rule is stated as follows: "A restriction upon the power of an agent not known to persons dealing with him, limiting the usual powers possessed by agents of the same character, would not exempt the principal from responsibility for his acts and contracts which were within the ordinary scope of the business intrusted to him, although he acted in violation of special instruction." *Lightbody v. North American Ins. Co.*, *supra*, was a case very similar to the case under consideration. The plaintiff owned property in Utica, upon which he procured insurance in the defendant company by parol agreement with an agent in Troy, whose authority was limited to "Troy and vicinity," and who was denied the power to insure special risks. The plaintiff's property was a special risk. The supreme court held the agreement to be binding on the defendant; Bronson, J., saying: "Although he [the agent] must answer to his principals for departing from their private instructions, he clearly bound them so far as third persons dealing with him in good faith are concerned."

The manner of conducting the business of insurance is so well known that a person may reasonably assume that one having the apparent power of a general agent is not limited

by his instructions as to the class of risks he may insure. Corporations organized under the laws of other states, and having their general officers in those states, do business in this state through agents, who are intrusted with policies signed by the officers of the company, and which become binding contracts upon the indorsement of the agent. Such agents have power to make original contracts of insurance; and this mode of conducting the business is so well established that it has become a part of the common knowledge of the community, and judicial notice must be taken of it: *Ellis v. Albany Fire Ins. Co.*, 50 N. Y. 406, 407; 10 Am. Rep. 495. Persons dealing with such agents in good faith have the right to assume that they possess the power usually exercised by that class of officers, and, unless the limitation on their authority is brought to their knowledge, the contracts made with them will be binding upon the company: *Walsh v. Hartford Fire Ins. Co.*, *supra*.

There was nothing in the transaction between Barker and Hammond, as shown by the evidence, from which the court could assume that Barker had any notice of any limitation on the agents' power. At the time of making the agreement, Hammond showed him a letter from the company; and it having been proven by Sedgwick that, prior to the fire, but one letter from the company was received, it must be assumed that the letter shown was that of October 13th. As I have already shown, this letter constituted Sedgwick and Hammond the general agents for the city of Brooklyn, and no one, in reading it, could have supposed that, by the reference to the Van Valkenburgh letter, the company intended to place any limitation upon the agents' power, but that the direction contained therein related to the manner of conducting the company's business at the agency. We think the contract made with Hammond was, therefore, binding upon the company.

There being no other question in the case requiring discussion, the judgment should be affirmed, with costs.

AGENCY — ORAL AGREEMENT FOR INSURANCE. — Where defendant's agent agreed orally with plaintiff to insure his building, and to make out and deliver a policy, the premium to be paid upon delivery, and no policy was made out, though the agent had authority to do so, the contract of insurance was valid, and defendant was liable upon the destruction of the house by fire: *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322.

AGENCY. — The acts of general agents within the general scope of their authority bind the principals, and third persons are not affected by any private instructions to such agent: *Munn v. Commission*, 15 Johns. 44; 8 Am. Dec. 219; *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62; *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476; *Blane v. Proudft*, 3 Call, 207; 2 Am. Dec. 546; *Topham v. Roche*, 2 Hill, 307; 27 Am. Dec. 387; *Walker v. Skipwith*, Meigs, 502; 33 Am. Dec. 161; *Loddell v. Baker*, 1 Met. 193; 35 Am. Dec. 358; *Towle v. Leavitt*, 23 N. H. 360; 55 Am. Dec. 195; *Commercial Bank v. Kortright*, 22 Wend. 348; 34 Am. Dec. 317.

HUSSNER v. BROOKLYN CITY R. R. Co.

[114 NEW YORK, 433.]

OWNER OF LAND ABUTTING ON STREET HAS SUCH EASEMENT IN STREET as enables him to insist, as against a street-railroad company, that it shall be devoted to such use only as is consistent with its purposes as a public street.

USE OF STREAM AS MOTIVE POWER IN MOVEMENT OF STREET-RAILROAD COMPANY'S CARS upon a street on which the company has no legal right to use it is in the nature of a nuisance, where the manner of such use has the effect to molest an abutting owner in the use and enjoyment of his premises, and he may recover damages for the injury thereby caused to him; and if such use depreciates the rental value of his premises, such depreciation is a proper measure of his damages.

IF DAMAGES UP TO TIME OF TRIAL ARE RECOVERED by the plaintiff, under the instructions of the court, in a case where he is entitled to recover only such as had accrued at the time of the commencement of the action, but no objection was made on that ground in the court below, the question cannot be presented on appeal. But such recovery may be a bar to any future claim for damages sustained by him prior to the time of the trial.

WHERE PLAINTIFF WAIVES RIGHT TO RECOVER NOMINAL DAMAGES FOR TRESPASS upon the street in front of his premises, and asks to recover only substantial damages for injury to his premises from the maintenance of a nuisance in the street in front thereof, and the court in charging the jury makes the right of recovery to depend upon the finding of the jury that there had been a substantial injury to the plaintiff's use of his premises resulting from the acts of the defendant, the question of the plaintiff's title to the street is thereby taken out of the case, and the refusal of the court to charge that the plaintiff had no right in fee to the street, and that the defendant had not trespassed upon the plaintiff's property, is not error.

ACTION to recover damages. The opinion states the case.

Samuel D. Morris, for the appellant.

George W. Roderick, for the respondents.

BRADLEY, J. The action was brought to recover damages to the plaintiffs' premises, alleged to have been suffered by the

unlawful running and operating of the defendant's cars upon the street in front of such premises, which are situated on the northwesterly corner of Third Avenue and Twenty-fourth Street, in the city of Brooklyn. Prior to 1877, the defendant operated a horse-car railroad on the avenue, and then, pursuant to an ordinance authorized by laws of 1873, chapter 432, steam-motors were applied by the defendant to run its cars between the city line on the south and Twenty-fourth Street on the north. For the purposes of this review, it must be assumed that the defendant had the right to use such motive power to run its cars upon Third Avenue between those points, and that the plaintiffs had no right to complain of the exercise of such right. The subject of their complaint is, that the defendant's cars so propelled did not stop at Twenty-fourth Street, but that after passing into and along it for some distance, they were backed into Third Avenue on the north side of that street, and there, in front of the plaintiffs' premises, were switched onto the southerly bound track, and in so doing, as evidence on the part of plaintiffs tends to prove, much noise was made, the plaintiffs' buildings shaken some, and cinders, smoke, and dust discharged and cast upon their premises, and the ordinary use of the street there interrupted, to the annoyance of the occupants, and, as a consequence, the value of the use of the property was depreciated. It is said this was continued, with only a few minutes' intermission between trains, daily, from early in the morning until midnight. The plaintiffs' building occupies fifty feet, fronting on the avenue, and consists of three stores on the ground floor and a dwelling over the central portion of them. The plaintiffs, as abutting owners, had such an easement in the street as to enable them to insist, as against the defendant, that it should be devoted to such use only as was consistent with its purposes as a public street: *Story v. New York etc. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268.

It will be assumed that the defendant had acquired the right to operate a horse-railroad on the avenue in front of the plaintiffs' place. The right to do so, given pursuant to statute, is not deemed inconsistent with street uses: *People v. Kerr*, 27 N. Y. 188; *Mahady v. Bushwick R. R. Co.*, 91 Id. 148; 43 Am. Rep. 661. The use of steam as a motive power in the movement of its cars, at the place in question, was without right on the part of the defendant, and so far as it, and the manner

in which it was used there in the operation of the cars, had the effect to molest the occupants in the use and enjoyment of the premises as indicated by the evidence on the part of the plaintiffs, it was in the nature of a nuisance. Whether any substantial injury resulted to the premises and their use from such causes, was a question of fact for the jury upon the conflicting evidence in that respect. The inquiry to which the proof was directed had relation to the effect upon the rental value of the premises, and there was evidence tending to show that the consequence of such cause was a depreciation of such value to the extent fully equal to the amount recovered. The weight of the evidence on that subject is not here for consideration. It may be assumed, in view of the instruction to the jury, that recovery was had for such damages so sustained up to the time of the trial, although the plaintiffs were entitled to recover such only as had accrued at the time of the commencement of the action: *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; 54 Am. Rep. 661; *Pond v. Met. El. R. R. Co.*, 112 N. Y. 186. But as that question was not raised at the trial, it is not here for consideration. If, however, the fact is as assumed in that respect, the recovery may be effectual as a bar to any future claim for damages sustained there by the plaintiffs prior to the time of the trial: *McGovern v. N. Y. C. & H. R. R. Co.*, 67 Id. 417.

The court was requested to charge the jury that the plaintiffs had no title to the fee in Third Avenue, and that the defendant had not trespassed upon the plaintiffs' property in operating its cars in front of their property. The court declined to do so, other than as before charged, and the defendant's counsel excepted. The plaintiffs in their complaint set forth the description of the premises in the same manner as it was represented by the deeds put in evidence, and alleged that the ancestor of the plaintiffs, and from whom they derived their title by descent, was seised and possessed of the premises so described, "subject only to the public easement of a common street or highway in that part thereof called Third Avenue." And they also alleged that, since the plaintiffs became such owners, the defendant had unlawfully operated its cars, propelled by steam, upon that portion of their premises within and bounded by the center line of the avenue. It is by reason of this element of trespass alleged in the complaint that the defendant's counsel contends the court should have charged as requested. Assuming, as we do, that such request was supported by the

fact embraced in it in respect to the boundary of the plaintiffs' premises, the defendant was entitled to the charge as requested, unless the matter was obviated by what had occurred at the trial. The defendant's counsel had moved the court to require the plaintiffs to elect whether they would claim to recover for trespass or nuisance, and the court remarked that if the plaintiffs would waive their right to recover nominal damages for a trespass, and ask to recover only substantial damages for injury to the premises, the motion would be denied. Thereupon the plaintiffs' counsel waived any right they had to nominal damages for trespass. And in the charge to the jury the court so treated the case, and made the right of recovery dependent upon the finding of the jury that there had been a substantial injury to the use of the plaintiffs' premises by the operation of the cars with steam in front of the premises, and charged them that the question whether they were bounded by the center of the avenue had no importance. It is therefore clear that the question of title to land within the street was, by the waiver of the plaintiffs' counsel and the charge of the court, out of the case as it went to the jury, and that the defendant could not be, and was not in any manner, prejudiced by the refusal of the court to charge as so requested, or by the charge as made in that respect.

We have examined all the exceptions appearing in the record to have been taken by the defendant, and fail to see in them any support for the charge of error in the rulings of the court.

The judgment should be affirmed.

STREETS — ABUTTING LOT-OWNERS. — The erection and operation of a railway in a street is inconsistent with the use of the street, and as to the abutting lot-owners is a taking of private property within the meaning of the constitution of New York, and it cannot be permitted without compensation to such owners, and they may restrain the operation of the railway by injunction: *Story v. New York etc. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146. And so where a railway company unreasonably uses a street to the special injury of an abutting lot-owner, the latter may sue the company although the fee of the street is in the city: *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148; 43 Am. Rep. 661. As to the liability of railway companies to abutting property owners, and the rights of such property owners against persons and corporations grading, improving, and otherwise using the street adjacent to their property, see the following recent cases: *Railroad v. Bingham*, 87 Tenn. 522; *Smith v. Railroad*, 87 Tenn. 626; *Ottawa etc. R. R. Co. v. Larson*, 40 Kan. 301; *Beseman v. Pennsylvania R. R. Co.*, 59 N. J. L. 235; *Denver etc. R'y Co. v. Schmitt*, 11 Col. 56; *Denver etc. R'y Co. v. Bourne*, 11 Id. 59; *Estlich v. Mason City etc. R'y Co.*, 75 Iowa. 413; *Florula etc. R'y Co. v. Brown*, 23 Fla. 105; *Pratt v. Des Moines etc. R'y Co.*, 72 Iowa, 249.

SEYMOUR v. SMITH.

[114 NEW YORK, 481.]

SURETIES IN UNDERTAKING ON APPEAL ARE CONCLUDED BY THEIR AGREEMENT TO PAY from bringing in question, in an action against them upon their undertaking, any issuable fact that was necessarily determined by the judgment which they have agreed to pay.

AGENT WHO RECOVERS JUDGMENT IN HIS OWN NAME HOLDS LEGAL TITLE thereto, and has power to sell and transfer it for the benefit of his principal; and a purchaser in good faith, to whom he assigns it, becomes the legal and equitable owner thereof, and the principal's interest therein ceases and determines; and the rights of such assignee will not be affected by payment to such principal after the making of the assignment.

RULE PROTECTING JUDGMENT DEBTOR WHO HAS PAID JUDGMENT to the former owner after it has been assigned, without notice of the assignment, extends only to those having the legal title, and does not extend to persons claiming to be beneficial owners.

TO MAKE PAYMENT OF JUDGMENT TO ONE NOT HAVING LEGAL TITLE THERETO EFFECTUAL, the party paying must show that the person to whom the payment was made had, at the time, the right to receive payment.

ACTION on undertaking on appeal. The opinion states the case.

Willis J. Benedict, for the appellant.

Henry H. Seymour, *pro se*.

HAIGHT, J. This action was brought upon an undertaking executed by the defendants to enable one Patrick Lynch to appeal to the general term of the supreme court from a judgment entered against him in favor of one Daniel Sourwine.

It appears that Daniel Sourwine obtained a judgment in the supreme court for \$577.47 against one Patrick Lynch, from which an appeal was taken to the general term; that upon such appeal the defendants executed an undertaking, conditioned that if the judgment appealed from, or any part thereof, was affirmed, or the appeal dismissed, that they would pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which it was affirmed. Thereafter the judgment was affirmed by the general term of the supreme court, and a judgment of that court was duly entered. An execution was thereupon issued upon such judgment to the sheriff of the proper county, and the same was returned unsatisfied. The plaintiff, as the assignee of such judgment, brought this action against the defendants as sureties upon such un-

dertaking for the purpose of recovering the amount of that judgment.

The defense is, that Sourwine obtained the judgment as the trustee of an express trust for one Charles M. Reed, executor, and that Lynch had paid Reed, as executor, the amount of the judgment. The question is presented as to whether this defense is available in this action. The undisputed facts are, in substance, as follows: Sourwine was the agent of Charles M. Reed, executor, having charge of his real estate in the city of Buffalo; that, as such agent, he leased certain premises to Lynch. It was understood that the New York, Lackawanna, and Western Railroad contemplated taking the property so leased for railroad purposes. Thereupon Lynch executed and delivered to Sourwine a paper, in and by which, for value received, he promised to pay Sourwine one half of any damages received by him for the canceling of his lease. Subsequently the railroad company did institute proceedings to condemn the property, and in such proceedings Lynch was awarded the sum of one thousand dollars as damages for the taking of his leasehold interest in the premises. It was for the recovery of one half of that sum that the judgment was obtained on which the undertaking on appeal was given.

Subsequent to the recovery of the judgment, and on or about the eleventh day of March, 1884, the judgment was, for a valuable consideration, duly assigned by Sourwine to the plaintiff; and such assignment was, on the twenty-first day of November, 1884, duly recorded in the office of the clerk of Erie County, that being the county in which the judgment roll was filed. Thereafter, and on the twenty-second day of July, 1885, Charles M. Reed, executor, acknowledged satisfaction of the judgment so recovered by Sourwine. At the time of the payment of the judgment to him, neither of the defendants or Lynch had notice of the assignment of the judgment to Seymour, other than that given by the recording of the assignment. Under these circumstances, it does not appear to us that the defendants are in a position to avail themselves of the defense interposed.

The agreement, as we have seen, was to pay Sourwine one half of the damages received. The action to recover that amount was brought by Sourwine in his individual name, and not as agent. The question as to whether he was entitled to recover was one necessarily determined in that action. The defendants had notice of his recovery at the time they exe-

cuted the undertaking, for the fact was recited in that instrument. The condition was, that they were to pay the amount of the judgment if it was affirmed or the appeal dismissed. Therefore, upon the affirmance of the judgment, they were concluded by their agreement to pay from again bringing in question any issuable fact that was necessarily determined by the judgment which they had agreed to pay: *Hill v. Burke*, 62 N. Y. 111-117; *Methodist Churches of New York v. Barker*, 18 Id. 463; *Freeman on Judgments*, sec. 176. Consequently the trial court, in this action, committed no error in holding that Sourwine had the legal title to the judgment at the time of its recovery.

Whilst the defendants, as sureties upon the undertaking, are bound by the record and facts necessarily determined by the judgment, which they agreed to pay, they are doubtless at liberty to put in issue, in this action, any question that was not necessarily determined in that action. They may show subsequent payment, and we are inclined to the opinion that they may also show that the judgment recovered by Sourwine was for the benefit of another; for that fact was not necessarily at issue in the former action. Sourwine, as the trustee of an express trust, could maintain the action without joining with him the person for whose benefit the action was prosecuted; and the contract, being in his name for the benefit of another, constituted him a trustee of an express trust: *Code Civ. Proc.*, sec. 449. Sourwine must, therefore, be treated as the legal owner of the judgment at the time of its recovery, but as holding such legal title for the benefit of Reed, as executor of the Reed estate, for whom Sourwine was agent. And had the settlement been effected by the defendant with Reed during the time that Sourwine was such legal owner, he would doubtless have been bound by the settlement so made. But Sourwine, as the legal owner of the judgment and agent of Reed, had the power to sell and transfer the judgment for the benefit of Reed, and it appears that this was done more than a year before the settlement was made. Seymour, as attorney, had prosecuted the former action under an arrangement with Sourwine that he should have for his services one half of the recovery, upon the affirmance of the general term. He paid Sourwine the other half of the judgment, and took an assignment thereof, which, as we have seen, was recorded in the office of the clerk of the proper county. It is contended that the plaintiff was not a purchaser in good faith, for the

reason that he knew of Reed's interest in the judgment. This may be, but he also knew that Sourwine was the agent of Reed, and had the legal title of the judgment and the power to sell and transfer it. There is no suggestion of any collusion between him and Sourwine, or of any disposition or intention on the part of Sourwine to convert the money derived from the transfer of the judgment to his own use. The evidence in reference to his agreement as to compensation for prosecuting the former action, and his evidence in reference to the amount paid for the assignment of the judgment, was competent for the purpose of showing that he paid full value and was a purchaser in good faith. It consequently appears that, upon the assignment of the judgment to Seymour, he became the legal and equitable owner thereof, and Reed's interest therein ceased and determined. So that at the time the settlement was made with Reed on behalf of the defendants, he had no interest in the judgment, equitable or otherwise. It is contended, however, that the defendants had no actual notice of the assignment of the judgment to Seymour, and that, consequently, they are protected in the settlement made. But the rule which they invoke does not extend to persons claiming to be beneficial owners. It only extends to those having the legal title: *Brewster v. Carnes*, 103 N. Y. 556; *Trustees of Union College v. Wheeler*, 61 Id. 88; *Bishop v. Garcia*, 14 Abb. Pr., N. S., 69. Had payment been made to Sourwine in good faith, without notice of his assignment to Seymour, a different question would have been presented. But when the defendants attempted to settle with some one other than the legal owner, in order to have the same effectual, the duty devolves upon them of showing that the person with whom the settlement was made at the time had the right to receive the payment and make the settlement. This they had failed to do; for it appears that at the time the settlement was made neither Reed nor his agent, Sourwine, had any interest in the judgment, legal or otherwise.

The judgment should therefore be affirmed, with costs.

APPEAL BOND. — A surety on an appeal bond is bound by the judgment: *Charles v. Hoskins*, 14 Iowa, 471; 83 Am. Dec. 378, and note 381.

ARGERSINGER v. MACNAUGHTON.

[114 NEW YORK, 565.]

COMMISSION MERCHANT IS BOUND TO ASCERTAIN CHARACTER OR QUALITY OF GOODS consigned to him without any communication to him from the consignor as to their character or quality, and to put them upon the market for what they are in that respect. He has no implied power to undertake that the goods are in any respect other than or different from what they actually are. And if he goes beyond his authority, and warrants the quality of the goods, the warranty will be his own, and he will be personally liable for its breach.

AGENT WHO CONTRACTS IN HIS OWN NAME, AND FAILS TO DISCLOSE HIS PRINCIPAL'S NAME at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract. The purchaser may, in such case, rely upon the responsibility of the person with whom he deals for the performance of the contract, and is not required to look elsewhere to obtain it.

PURCHASER OF GOODS WITH WARRANTY IS NOT BOUND TO RETURN THEM upon discovery by him of the breach of the warranty; but he has the right to retain them, and seek his remedy founded upon the breach of the warranty; and this right is not qualified by the fact that the seller was dealing with the property of others to whom he was required to account for the proceeds of sales made by him, where the purchaser, soon after the sale, advises him of his claim for damages for the breach.

ACTION for breach of warranty in sale of goods. The opinion states the case.

A. Blumenstiel, for the appellant.

James A. Dennison, for the respondents.

BRADLEY, J. This action was brought to recover damages alleged to have been sustained by breach of warranty in the sale by the defendant to the plaintiffs of a quantity of antelope skins, and the plaintiff recovered. The defendant was a commission merchant in the city of New York. The sale in question was in the line of his business, and made by him as such merchant. The referee found that the warranty was made by the defendant that they were a sound, choice lot of Indian-handled skins, free from damage by worm-cut, and that there was a breach of such warranty. The evidence on the part of the plaintiffs tends to prove those facts, and for the purpose of this review they must be deemed established. The main contention on the merits on the part of the defendant is, that he was not liable, because the sale was made by him as agent of his consignors of the property sold. Upon that subject, the referee found that the defendant did not sell the skins upon his own account, but as commission merchant,

and that the plaintiffs knew that he was acting as an agent only, and that his commission was five per cent. The referee, however, determined that the warranty was the undertaking of the defendant, and that he was charged with liability by its breach. The general rule is, that an agent employed to do an act is deemed authorized to do it in the manner in which the business intrusted to him is usually done, and such is the presumed limitation upon his power to act for his principal: *Easton v. Clark*, 35 N. Y. 225; *Smith v. Tracy*, 36 Id. 79; *Up-ton v. Suffolk Co. Mills*, 11 Cush. 586; 59 Am. Rep. 163.

While the defendant dealt in the property of others, for whom he made sales, his business of commission merchant was his own. He undertook to sell the goods sent to him for this purpose, and to account to his consignors for the proceeds, less his commission. As between him and them, without any special instructions or authority, it would seem to be inferred that he should sell the goods as they were. And it is difficult to find in such case any implication of power, derived from them, to undertake that the goods were in any respect other or different than they in fact were. Unless the character or quality of the goods consigned to him is communicated by the consignors, it is the business of the commission merchant to ascertain what they are in that respect, and put them upon the market only as such; and when he goes beyond that he is not, as between him and his principal, within the authority presumptively conferred by the latter upon him. It does not appear that those parties, from whom the defendant received the property in question for sale, gave him any description of the quality or condition of it, or that he acted otherwise than upon his own knowledge or judgment in that respect in making the sale and warranty; nor is it found that he had authority from his consignors to warrant it. But there was some evidence given, on the part of the defendant, to the effect that it was the custom in the trade of commission dealers not to warrant goods sold. While the purpose of such evidence was to bear upon the fact whether any warranty was made, and in support of his proof that none was made in this instance, it also went further, and may have been treated as bearing upon the question of the presumption of authority from his principal. If the custom of such dealers was to sell goods as they were, and solely upon the inspection and risk of the purchasers, it is certainly difficult to see how any authority from the defendant's principals to warrant could presumptively arise to

relieve him from personal liability for such undertaking made by him to the plaintiffs.

The conclusion was therefore permitted that the defendant's relation to the warranty and its consequence was not qualified by his agency, pursuant to which he made the sale to the plaintiffs.

The defendant did not inform the plaintiffs, nor were they in any manner advised, of the name or names of the party or parties who sent the skins to the defendant to be sold by him. The question is presented, whether the fact that the defendant failed to give the plaintiffs such information was sufficient to deny to him the right to make his agency effectual as a defense. It does not appear that the plaintiffs had any knowledge of the names of the consignors of the property, or that the defendant supposed they had such knowledge. In such case, there is some reason to conclude that the defendant intended to make the warranty his own as between him and the purchasers. And the proposition that an agent contracting in his own name, and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract, has the support of authority: *Mills v. Hunt*, 17 Wend. 333; *Morrison v. Currie*, 4 Duer, 79; *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51; *Ludwig v. Gillespie*, 105 N. Y. 653; *Jemison v. Citizens' Sav. Bank*, 44 Hun, 412. That doctrine is applicable to the present case. The defendant made the contract of sale in his own name, as commission merchant, without disclosing the name of any principal; and his warranty given to produce it may, within that rule, as between the parties, be deemed his undertaking. In such case, it may be supposed that a purchaser relies upon the responsibility of the person with whom he deals for the performance of the contract, and that he is not required to look elsewhere to obtain it. When there is, in fact, a principal, the agent may ordinarily relieve himself from personal liability, upon a contract made in his behalf, by disclosing his name at the time of making it. Upon such disclosure, however, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal, but to permit an agent to turn over to his customer an undisclosed, and to the latter unknown, principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the

contract. The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to it of the name of the principal whom he assumes to represent in making it, where that is unknown to such party.

This proposition is not inconsistent with the general rule that an agent, acting within the scope of his authority with a party advised of his agency, will not be personally charged, unless it appears that such was his intention: *Hall v. Lauderdale*, 46 N. Y. 70. The disclosure of his agency is not completely made, unless it embraces the name of the principal; and without that the party dealing with him may understand that he intended to give his personal liability and responsibility in support of the contract and for its performance. The cases cited by the defendant's counsel, having relation to the right of set-off in behalf of a person who has dealt with an agent, whose agency was unknown to such person, have no necessary application to the question now here. In those cases the question arose between the principal and the party dealing with the agent, without any knowledge of his agency, and upon the faith that he was dealing on his own account in selling property in his possession, and of which he apparently was the owner. And in such cases the right of the party purchasing property of the agent to set off a claim against the latter, in an action brought by the principal, is dependent upon, not only want of actual knowledge of the agency, but of circumstances which would direct a prudent man to inquiry and information of the fact, or furnish him reason to believe that he was dealing with an agent: *Wright v. Cabot*, 89 N. Y. 570; *Nichols v. Martin*, 35 Hun, 168, and cases there cited. This rests upon the principle that where one of two innocent parties must suffer loss, it should fall on him who has furnished the means and opportunity to another to do that which is done by the latter to cause it. The contract of sale was an executed one, and while the return of the property to the defendant may have been a suitable manner of amicably adjusting the matter, the plaintiffs were not legally required to do so. After the skins were purchased by and delivered to them, the plaintiffs had the right to retain them, and seek their remedy founded upon breach of the warranty. Nor is it seen how that right is qualified, as applied to this case, by the fact that the defendant was dealing with the property of others to whom he was required

to account for the proceeds of sales made by him. He was, soon after the sale, advised of the claim of the plaintiffs for damages on account of the impaired condition of the skins; and if the defendant, as between him and his consignors, acted within the authority derived from them in making the warranty, he had the opportunity of seeking indemnity in some manner before he paid over such proceeds to his principals. It is deemed unnecessary to advert more fully to the evidence in support of the facts found by the referee, as it does not appear that the case contains all the evidence: *Porter v. Smith*, 107 N. Y. 531.

We have examined all the exceptions taken by the defendant on the trial, and to the conclusions of fact and law of the referee, and find no error in any of the rulings to which they were taken.

The judgment should be affirmed.

AGENCY. — An agent is personally liable upon his contracts as such, unless he can show authority to bind his principal: *Gillaspie v. Wesson*, 7 Port. 454; 31 Am. Dec. 715; and note to *Davis v. Henderson*, 59 Id. 231, for the liability of an agent upon contracts executed in his own name.

SALE — BREACH OF WARRANTY. — A purchaser may, without returning or offering to return, when there has been a breach of warranty, bring an action for damages for a breach of his contract: *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737; *Getty v. Roundtree*, 2 Pinn. 379; 2 Chand. 28; 54 Am. Dec. 138; *Kass v. John*, 10 Watts, 107; 36 Am. Dec. 148; *Voorhees v. Earl*, 2 Hill, 288; 38 Am. Dec. 588; *Allen v. Anderson*, 3 Humph. 581; 39 Am. Dec. 197; *Price v. Lewis*, 17 Pa. St. 51; 55 Am. Dec. 536. An action may be maintained on a warranty without a return of the property by the purchaser: *Storrs v. Emerson*, 72 Iowa, 390. Where an article is sold with a warranty as to its quality, and a condition that the purchaser may return it if it does not correspond with the warranty, the purchaser, in case of a breach of warranty, is not limited to the right of returning the property, but may keep it, and sue for damages for a breach of the contract: *Shupe v. Callender*, 56 Conn. 489.

HANGEN v. HACHEMEISTER.

[114 NEW YORK, 566.]

CHattel Mortgage is Void as to Creditors of Mortgagor, where there is an agreement or understanding between the parties thereto, at the time of its execution, that the mortgagor may sell or dispose of the property mortgaged for and on his own account. And such agreement or understanding may be proved by parol, or inferred from the fact that the sales are permitted by the mortgagee.

ADMINISTRATOR MAY DISAFFIRM AND TREAT AS VOID MORTGAGE MADE BY HIS INTERSTATE in fraud of the rights of the latter's creditors. The administrator represents the creditors as well as the estate.

EXCEPTION TO EVIDENCE ADMITTED IS NOT AVAILABLE ON APPEAL, where no objection is made until after its admission, and no motion is made to strike it out.

EVIDENCE OF PLAINTIFF'S RECEIPTS AND DISBURSEMENTS FOR TWO WEEKS prior to the taking and carrying away of his property, as alleged in his complaint, is properly admitted for the purpose of determining the amount of his damages, where the complaint alleges that the taking of the property broke up, injured, and destroyed his business.

EVIDENCE OF PRICE PAID FOR PROPERTY WITHIN THREE WEEKS before the taking of it is admissible for the purpose of proving its value at the time of the taking, where there is no pretense that it has changed in value during that time.

WITNESS IS COMPETENT TO EXPRESS HIS JUDGMENT AS TO VALUE OF PROPERTY, where he testifies that he is familiar with such property, that he has bought and sold property of that grade, and for eight years has been engaged in a business in which such property is bought and sold.

REFUSAL TO GIVE CHARGE WHICH IS INCOMPLETE, AND, AS IT STANDS, MEANINGLESS, is not error.

CHATTEL MORTGAGE IS VITIATED BY AGREEMENT THAT MORTGAGOR MAY SELL the property mortgaged, and apply the proceeds to other purposes than the mortgage debt, and not by the fact that such sale has been made.

ACTION to recover the value of property unlawfully taken, and damages for the taking. The opinion states the case.

Henry Daily, Jr., for the appellant.

Richard L. Sweetz, for the respondent.

HAIGHT, J. This action was brought to recover the value of certain personal property, consisting of bar-fixtures, gas-fixtures, water-fixtures, pumps, counters, tables, chairs, glassware, window-shades, and other property contained in the saloon at No. 44 Clinton Place, in the city of New York, which, it is alleged, was wrongfully and unlawfully taken from the plaintiff by the defendant, carried away, and converted to his own use; and also for damages for breaking up and injuring the plaintiff's business, reputation, and credit.

The defense is, that the property was taken by virtue of a chattel mortgage. It appears that, in the year 1877, a young man by the name of George A. Von Rauscher was engaged in conducting a saloon at the place in question, and upon the nineteenth day of October, 1877, he died; that the public administrator of the city was appointed the administrator of his estate, and as such took possession of his personal property, and thereafter, and on the 27th of October, 1877, sold at public auction the furniture, fixtures, and appurtenances of the saloon to the plaintiff for the sum of \$483, who thereupon entered

into the possession of the place, and continued the business with the property thus purchased; and about the middle of November thereafter, the defendant, who is a member of the firm of George Ringler & Co., entered the premises with a number of men and took and carried away the property in controversy. It further appears that on the first day of November, 1876, Von Rauscher executed to one August Von Rauscher a chattel mortgage upon the wines, liquors, articles of furniture belonging to him, and all other goods and chattels mentioned in a schedule annexed, that was at that time in the saloon at 44 Clinton Place, New York, to secure the payment of a promissory note for \$340, payable in one year from date. The mortgage provided that, until default be made in the payment, the mortgagor was to remain and continue in the quiet and peaceable possession of the said goods and chattels and the full and free enjoyment of the same. The schedule annexed enumerated the chairs, tables, counters, bar, fixtures, etc., contained in the saloon, including the stock of wines, ales, liquors, and cigars. This mortgage was subsequently assigned to the firm of George Ringler & Co., who were the owners of it at the time the property was taken by the defendant.

Upon the trial the plaintiff claimed that the mortgage was fraudulent and void for the reasons,—1. That Von Rauscher, the mortgagor, at the time it was executed was an infant under the age of twenty-one years; and 2. That it was executed under an agreement that he should continue in the possession of the property and have the full and free enjoyment of it, with the right to sell and dispose of the wines, ales, liquors, and cigars for his own benefit and advantage, without applying the proceeds upon the mortgage debt. As to the claim of infancy, the trial court held and decided that it was not established, and only submitted to the jury the question as to whether there was an agreement that the mortgagor was to have the right to sell and dispose of the property mentioned, and to retain the proceeds thereof. The jury found a verdict in favor of the plaintiff for the value of the property taken, thus finding that such agreement was made. In the case of *Southard v. Benner*, 72 N. Y. 424, it was held that if, at the time of the execution of a chattel mortgage upon the stock of merchandise, it is understood and agreed between the parties that the mortgagor may sell the stock and use the proceeds in his business, and the agreement is carried out, the mortgagor making the sales with the knowledge of the mortgagee, the

transaction is fraudulent in law as against the creditors of the mortgagor. It was further held in that case that such an agreement might be proved by parol, or inferred from the fact that the mortgagee had permitted the sales to be made.

In the case of *Potts v. Hart*, 99 N. Y. 168, it was held that the mortgage would be void when it is given with a tacit understanding that such sales may be made; and in the case of *Russell v. Winne*, 37 Id. 591, 97 Am. Dec. 755, it was held that an agreement that the mortgagor may remain in possession, and sell or dispose of the mortgaged property for his own use, rendered the mortgage fraudulent as to creditors, whether the agreement be contained in the instrument or was independent of it, and that if it was void as to a part of the chattels covered by it, it was void as to the whole.

The wines, ales, liquors, and cigars constituted the stock of merchandise embraced in the mortgage. The administrator represented the creditors as well as the estate. As such, he had the right to disaffirm, and treat as void, the mortgage, if it was made in fraud of the rights of creditors. It appears that there were other creditors of the deceased, and it is understood that he was insolvent. The administrator, therefore, had the right to take possession of the property, to sell it at public auction, and give a good title to the purchaser, provided the agreement complained of was, in fact, made.

As we have seen, the agreement may be a tacit understanding; it may be proved by parol, or inferred from the fact that the sales were permitted by the mortgagee. The first bit of evidence we have upon the subject appears in the provisions of the mortgage, in which it was agreed that the mortgagor should remain and continue in the quiet and peaceable possession of the goods and chattels, and have the full and free enjoyment of the same, until default was made in the payment, which was a year from the date of the instrument. There was further evidence to the effect that the mortgagee was a brother of the mortgagor, and that he had loaned the mortgagor the sum of \$340 to enable him to carry on the saloon. The stock in trade consisted of wines, ales, liquors, and cigars. The business engaged in consisted of the sale of these commodities; and if they could not be sold, the mortgagor could not well conduct his business of keeping a saloon. It further appears, from the evidence, that the mortgagor did continue the business of running the saloon down to about the time of his death, conducting it in the usual way. It appears

to us that the jury had the right to infer from these facts that it was mutually understood between the parties that the mortgagor should have the right to sell and dispose of the merchandise embraced in the mortgage for and on his own account, and that the mortgage was consequently void as against creditors. This question was submitted to the jury without exception on the part of the defendant; and we must regard the parties as concluded by the finding.

Upon the trial, evidence was given tending to show the plaintiff's receipts from sales made each day for two weeks before the property was taken. After the evidence had been taken, the objection was made that there was no claim made for such damages. The objection was overruled, and an exception was taken. Evidence was also given showing the expenses each day. The exception is not available here, for the reason that the objection was not made in time, and there was no motion to strike out the evidence taken. But such damages were claimed in the complaint. It was alleged that the taking of the property broke up, injured, and destroyed the plaintiff's business, brought him into disgrace, and injured his business, reputation, and credit, for which he suffered damages, etc.

In determining the amount of such damages, it was necessary to understand the nature and amount of business that he was carrying on at the time the property was taken, and the receipts and disbursements for two weeks prior to that time does not appear to us to be too remote: *Schile v. Brockhahus*, 80 N. Y. 614. Evidence was also given tending to show that there was an arrangement between the administrator and the defendant by which the property was to be sold, and the proceeds retained, subject to the determination of the question of the validity of the mortgage. Objection was taken to this evidence as irrelevant and incompetent. The conversation was with Mr. Tenny, the defendant's lawyer, the person who had been employed to foreclose the mortgage and take possession of the property. A controversy had arisen between him and the public administrator as to the validity of the mortgage; the objection was not placed upon the ground that Tenny was not authorized to make the arrangement; had it been, evidence to that effect might have been supplied; for this reason, the exception is not well taken.

The plaintiff was permitted to testify as to the cost of arti-

cles purchased by him from other sources than the administrator, which he claimed was taken by the defendant, and also as to the amount that he paid for the property taken at the administrator's sale. The first objection was based upon the ground that it furnished no evidence of the actual value at the time that the property is alleged to have been taken. It, however, appeared that the property had been purchased within three weeks of the time that it was taken, and there is no pretense that it had changed in value during that time. The second objection was based upon the ground that the witness was not an expert as to the value of such property. The court admitted the evidence, but subsequently held that he was not qualified to give an opinion as to the value of the property, upon the ground that he was not an expert. His evidence was to the effect that he was familiar with such property; that he had bought and sold that grade of property, and had for eight years been engaged in the business of keeping a saloon, and in buying and selling fixtures and saloons. It appears to us that he was competent to express his judgment as to the value of the property, and we are therefore of the opinion that the evidence was competent, and within the rule stated in the case of *Hoffman v. Conner*, 76 N. Y. 121-124.

The defendant requested the court to charge that the plaintiff must prove that this mortgagor actually sold, as his stock in trade, property covered by the mortgage, and applied the money to other purposes than the mortgage debt, which was refused. It was the agreement that the mortgagor might sell the stock in trade, and apply the proceeds to other purposes than the mortgage debt, that vitiated the mortgage, and not the fact that such sale had been made. But the request is incomplete, and, as it stands, is meaningless. It does not point out the consequences that would result in case of failure to make such proof. We suppose that the defendant intended to request the court to charge that the plaintiff, in order to recover, must prove, etc. The proposition was substantially charged, and we do not feel justified in supplying the words necessary to make the exception available. We have examined the other exceptions appearing in the case, but are of the opinion that they point to no error.

The judgment should therefore be affirmed, with costs.

CHATTEL MORTGAGES — FRAUDULENT CONVEYANCES. — A transfer of property which attempts to secure to the transferrer the use of the property transferred, to the exclusion of creditors or others having claims upon it, is

fraudulent upon its face: *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642. Chattel mortgage is not void because the mortgagor is to receive some benefit therefrom, if the provisions are in good faith, and not for the purpose of defrauding creditors; but the question of good faith is for the jury: *Whitson v. Griffe*, 39 Kan. 211; 7 Am. St. Rep. 546, and note 550; *Conbling v. Shelley*, 28 N. Y. 360; 84 Am. Dec. 348; *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472; *Barnet v. Fergus*, 51 Ill. 352; 99 Am. Dec. 547; compare *Roundy v. Converse*, 71 Wis. 524; 5 Am. St. Rep. 240, and note 242, as to the validity and construction of chattel mortgages with power in the mortgagor to sell the mortgaged chattels.

FREDENBURG v. NORTHERN CENTRAL R'Y Co.

[114 NEW YORK, 562.]

RAILWAY COMPANY IS BOUND TO USE REASONABLE CARE IN PROVIDING SUITABLE MEANS, appliances, and structures with a view to the safety of its employees, and that they may not be unnecessarily exposed to danger of injury in its service. And where a switchman in its employ, while coupling cars after dark, falls into a cattle-guard near the scales on which the cars are weighed, without knowing it to be there,—he having been but three days in the company's service,—and is injured, the location in question being the place where cars when weighed were commonly and habitually coupled, the jury is warranted in finding that the cattle-guard so located was liable to put the switchman in danger of injury in proceeding to couple cars there without the caution which knowledge of it would enable him to exercise; and that the company in permitting the cattle-guard in that place in the condition in which it was failed to perform its duty to him, and was chargeable with negligence, although it had been usual to couple cars over it, as they came from the scales, and no injury had hitherto resulted from it; and also that, considering his recent entrance into the service, and the fact that his duties had not, up to that time, called him to the place in question, he was not chargeable with contributory negligence, although he had a lighted lantern in his hand at the time the accident happened.

ACTION to recover damages for personal injuries. The opinion states the case.

Diven and Redfield, for the appellant.

H. Austin Clark, for the respondent.

BRADLEY, J. The action was founded upon the alleged negligence of the defendant, and brought to recover damages for personal injury suffered by the plaintiff while in the service of the defendant. The plaintiff had been in such service three days as switchman in the defendant's yard at Elmira, New York, and then while engaged in coupling cars his arm was crushed, and as the consequence, was amputated. The evidence warranted the conclusion that the injury was caused

by his stepping into a cattle-guard, where he was proceeding to couple cars. And the charge of negligence against the defendant is made upon the fact that it had put and maintained as it had the cattle-guard at that place. It was near the scales where the defendant weighed its cars, and on and over it the cars passed when pushed from the scales after being weighed. On this occasion, the defendant was engaged in weighing cars. And when the weight of one was taken, that car was shoved off and at the same time another placed on the scales by the movement of the engine at the other end of the train. In that manner cars were displaced from and placed upon the scales until the weighing of those of the train put there for that purpose was completed. When the second one was shoved from the scales, the plaintiff was directed to go and couple it with the car which preceded it. This he was proceeding to do when he received the injury. The ends which he sought to couple of the two cars were over the cattle-guard, which he stepped into, and fell. And it must here be assumed that this was the cause of the injury. His arm was caught between the bumpers of those approaching cars and crushed. When the plaintiff entered into the defendant's employment, he assumed the usual hazards of the service and such risks as were apparent to observation: *Gibson v. Erie R. R. Co.*, 63 N. Y. 449; 20 Am. Rep. 552.

But the duty was with the defendant to use reasonable care in providing suitable means, appliances, and structures with a view to the safety of its employees, and that they might not unnecessarily be exposed to danger of injury in the service. The use of cattle-guards are essentially proper for recognized purposes at some places on railroads. The question has relation to the location and situation of this one. It had been there for several years. And although it had been usual to couple over it cars as they came from the scales, no injury, so far as appears, had resulted from it. The fact that the location in question was the place where cars when weighed were commonly and habitually coupled imposed upon the defendant the duty to use care to make that place reasonably safe for that service of its employees. The description given of this structure was such as to enable the jury to say that it was liable to put in danger of injury a person proceeding to couple cars there without the caution which knowledge of it would enable him to exercise. And upon the evidence, the finding of the jury was warranted that the defendant, in permitting

the cattle-guard to remain at that place in the condition in which it was, had failed to perform its duty to its employees, and was chargeable with negligence. But that did not render the defendant liable to the plaintiff, if the cattle-guard was obvious or known to him at the time in question: *De Forest v. Jewett*, 88 N. Y. 264; *Appel v. B., N. Y., & P. R. R. Co.*, 111 Id. 550. The occurrence was in the evening; it was then dark; and although the plaintiff had a lighted lantern, the evidence permitted the jury to find that he had no knowledge up to that time of the cattle-guard, and that without any negligence on his part he did not observe it at the time he attempted to couple the cars upon the occasion when he received the injury. It is urged that the plaintiff was bound to make himself acquainted with the situation presented by the various structures about the yard, and their condition. It is quite true that his duty was to use due diligence to familiarize himself by observation with the structures and their situation and condition in the yard, with a view to his own safety in the performance of his duty and for the protection of himself against injury. But his recent entrance into the service, and the fact that his duties hitherto had not called him to the place in question, enabled the jury to find that his failure to escape the injury was not attributable to any want of diligence on his part in that respect. The case seems to be within the doctrine of *Plank v. New York etc. R. R. Co.*, 60 Id. 607. The exception to the denial of the motion for nonsuit was, therefore, not well taken. And the questions of fact presented by the evidence were properly submitted to the jury.

The judgment should be affirmed.

MASTER AND SERVANT. — The master must supply safe appliances and instrumentalities for the use of his servants, and he must use reasonable diligence in ascertaining whether his machinery is safe: *Wootilla v. Duluth Lumber Co.*, 37 Minn. 153; 5 Am. St. Rep. 832; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Gutridge v. Missouri etc. R. R. Co.*, 94 Mo. 468; 4 Am. St. Rep. 392, and note; *Little Rock etc. R. R. Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Clapp v. Minneapolis etc. R. R. Co.*, 36 Minn. 6; 1 Am. St. Rep. 629; *Chicago etc. R. R. Co. v. Sweet*, 45 Ill. 197; 92 Am. Dec. 206, and note 213; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; 59 Am. Rep. 68, and note 78.

HAYES v. NOURSE.

[114 NEW YORK, 595.]

PENDENCY OF ACTION, OR RECORDED NOTICE THEREOF, DOES NOT MAKE TITLE DEFECTIVE. — Neither a pending action brought to establish title to or a lien upon land, nor a duly recorded notice of its pendency, of itself, makes the title defective, or creates a lien on the land.

INFANCY OF HEIRS OF DECEASED PLAINTIFF IS NOT LEGAL EXCUSE for their failure to perform the contract of their ancestor, in an action to compel a vendor to specifically perform a contract for the sale of land, and the laches which would have barred such an action by him will bar a like action prosecuted by them.

PURCHASER, PENDENTE LITE, OF SUBJECT OF LITIGATION IS NOT AFFECTED BY SUIT pending, or by the notice of its pendency, unless the suit has been prosecuted with due diligence, if he buys in good faith, and without actual notice of the claims of the litigants.

RIGHT TO REVIVE ACTION LOST BY LONG DELAY, WHEN. — The right of a plaintiff to revive and continue an action against the successors in interest of a deceased defendant may be lost by long delay in making the application, especially if the successors are purchasers in good faith, and the condition and value of the property have greatly changed, and the only witnesses by which the facts in issue can be established are dead.

ACTION brought to recover a payment made at the time of the execution of a contract for the sale of lands on the ground of defect in title. In 1819 Peter Kemble owned in fee and was in possession of the lots in question, in the city of New York. He died February 1, 1823, having devised the lots to his five children. His will was duly probated, April 7, 1824, four of the devisees conveyed the lots to the fifth devisee, Mary Kemble, who recorded her deed, and some time thereafter, the date not appearing, took possession under her deed, and remained in possession until October 1, 1854, when she conveyed to James N. Paulding, who recorded his deed, immediately took possession under it, and remained in possession until August 30, 1884, when he conveyed to the defendant in this action in trust for the benefit of creditors. March 25, 1885, the defendant sold the lots by public auction to the plaintiff for \$26,100. She paid down \$2,650, and contracted to pay the balance and take a deed April 15, 1885. But before the last-named date she discovered facts which she claimed made the defendant's title defective, or, at least, so doubtful that she was entitled to rescind the sale and recover the amount paid. The time for the performance of the contract was extended to May 16, 1885, when plaintiff finally refused to take the title, demanded the repayment of the \$2,650, and began this action. The facts discovered were: 1. A bill

filed July 31, 1836, in the late court of chancery, wherein John McGeer, Thomas McGeer, Peter McGeer, an infant, and Mary A. McGeer, an infant, were complainants, and Gouverneur Kemble, William Kemble, Richard F. Kemble, Mary F. Kemble, and Gertrude Kemble Paulding, the five children and devisees of Peter Kemble, were defendants; 2. A notice of the pendency of the action, filed the same day; 3. The joint and several answer of the defendants, verified January 28, 1837; 4. Depositions taken in the suit, in November and December, 1837, before a master; 5. An order entered April 26, 1838, closing the proofs; 6. An order entered May 25, 1844, substituting Charles O'Connor as solicitor for the complainants. The bill alleged that, August 13, 1819, Peter Kemble and Arthur McGeer (the father of the complainants) mutually executed an executory contract, by which Kemble agreed to sell, and McGeer to purchase, the lots for twelve hundred dollars, and that, September 18, 1819, the vendee paid one hundred dollars, and November 20, 1819, one hundred dollars, on the contract, entered into possession, and in 1819 and 1820 expended two thousand dollars in erecting a dwelling and making other improvements; that to complete the dwelling McGeer borrowed three hundred dollars of Kemble upon an oral agreement that Kemble should convey the lots to McGeer, and receive from him a mortgage on them as security for the loan and the remainder of the purchase price; that, to secure Kemble until the deed and mortgage should be exchanged, McGeer delivered the contract for the lots to Kemble, who failed to convey them, and never returned the contract; also, that McGeer continued in possession, paying interest on the contract until May 25, 1825, when he died intestate, leaving the complainants his only heirs at law, then infants of tender years; and that, shortly thereafter, the defendants took and have ever since retained possession of the lots. The defendants, in their answer in that suit, admitted the execution and delivery of a written contract of sale and the payment of two hundred dollars, but averred that the contract was to be performed within two years; admitted that McGeer took possession, built a house, and made improvements, but averred that the improvements did not cost two thousand dollars; admitted that Kemble loaned McGeer money to complete his dwelling, but denied that Kemble received the contract as security until a deed and mortgage could be exchanged between the parties; and averred that,

November 7, 1821, McGeer and Kemble had a settlement, and there was found due on the contract, for money loaned and interest, seventeen hundred dollars, which McGeer, by his bond, covenanted to pay in one year, with interest, but never paid this sum, or any part of it. In fact, several perfect defenses were alleged in the answer. The referee in the present case found that no proceedings were taken in the equity suit between April 26, 1838, and May 25, 1844, and none since the last-named date. He found that all the defendants in the equity suit, except Richard F. Kemble and Mary Kemble Parrott, died prior to November 6, 1881; also that, about twenty years ago, James N. Paulding, then the owner of the lots, made an unsuccessful effort to find the complainants, and that it does not appear what has become of them. The following is the testimony of said James N. Paulding on that point: "That attempt was twenty years before this sale, more or less; I should think quite that; I have not the *data* to give the exact date, but I should think it must be twenty years ago. When he, the purchaser at the auction sale, came to search the title, he made this objection; I did not push it; I was astonished; that is the first thing I knew about anything being the matter with the title; I let it go; I, at the time, tried to find these people, the McGeers; I employed two men that I thought would be most likely to find out about these people; one was an agent I had then for the property; he had been agent for a long while, and knew all about it; the other was a merchant who had lived there for some time, and had known these parties; they did their best to find out about them, and reported to me that they could not be found or heard of; had not been heard of for a great many years; the last that had been heard of them was, that the man had been a sort of river-pirate, and the woman was a drunkard, and had been carried off to the poor-house or asylum, or something or other, and had disappeared, and everybody came to the conclusion that they were dead; that was the general opinion." Other facts are stated in the opinion.

George Woodward Wickersham, for the appellant.

W. B. Putney, for the respondent.

FOLLETT, C. J. A pending action, brought to establish title to or a lien upon land, does not of itself, nor does a duly recorded notice of its pendency, make the title defective or create a lien on the land: *Mahaiwe Bank v. Culver*, 30 N. Y.

313; *Wilsey v. Dennis*, 44 Barb. 354; *Osbaldeston v. Askew*, 1 Russ. 160; *Bull v. Hutchins*, 82 Beav. 615; 1 Dart on Vendors, 6th ed., 564; 1 Sugden on Vendors, 7th Am. ed., 592, p. 50, *520. In *Bull v. Hutchins*, *supra*, Sir John Romilly, the learned master of the rolls, discussing this question, said: "It [the registered notice] was notice of the existence of a suit in chancery, and required all persons dealing with the property to look at the proceedings to see whether it did affect the property or not. Here the *lis pendens* was no encumbrance if Pratt had no right against the property, for it depended on the validity of his claim, for, if his claim were idle, it could not create any encumbrance on the property. A man might file a bill claiming property, alleging that sixty years ago his ancestor was seised in fee; and that, although he had sold the property, yet he had no right to do so. The plaintiff might register this as a *lis pendens*; but could anybody say that this was an encumbrance on the property, or a reason why a purchaser should not complete his purchase? All that the registration of a *lis pendens* does is to require persons to look into the claims of the plaintiff who registers it."

The record before this court is barren of evidence, except such as is contained in the papers filed in the suit in chancery, tending to show that the complainants in that suit ever had an interest in or lien upon the lots. Nevertheless, this case will be decided upon the assumptions,—1. That all of the allegations in the bill were true at its date; 2. That the facts there alleged were found by the referee in this action upon competent and sufficient evidence; and 3. That those facts were sufficient to have entitled the complainants, in 1836, when their bill was filed, to a judgment requiring Mary Kemble, then the owner of the legal estate, to receive the remainder of the purchase price from the complainants, and convey to them the lots. Were it material, the defendant might well complain of these assumptions; for while the admissions made by Mary Kemble in her answer to the bill in chancery, when she was the owner and in possession of the lots, are evidence against the defendant, the unadmitted allegations of the complainants in their bill, on which the assumptions are based, are not evidence against him; and besides, the assumed facts were not found by the referee.

Resting upon these assumptions, could the complainants, if living, or if dead, their successors in interest, in March, 1885, have compelled the defendants in this action to accept of the

remainder of the purchase price, and convey the lots? If the answer to this question be doubtful in a legal sense, by reason of resting on a disputed state of facts, or on unascertained facts, the plaintiff was not bound to take the title. Whether, in actions brought to enforce the specific performance of executory contracts for the sale of land, courts should determine doubts respecting the title which depend solely on an unsettled question of law, and decree performance when the unsettled question is decided in favor of the validity of the title, seems not to have been definitely settled: *Abbott v. James*, 111 N. Y. 673; *Osborne v. Rowlett*, L. R. 13 Ch. Div. 774; Fry on Specific Performance, 3d Am. ed., 435, sec. 871; Pomeroy on Specific Performance, 281, sec. 202. But it is unnecessary to enter into this controversy, for the determination of the validity or reasonableness of the vendee's doubt in the case at bar does not depend upon the decision of an unsettled legal question.

It is assumed, without deciding the question, that a vendee may recover money paid on an executory contract for the sale of land, by proving the title so doubtful that a court would not compel him to take it. Upon this question, see *Burwell v. Jackson*, 9 N. Y. 542; *O'Reilly v. King*, 2 Rob. (N. Y.) 587; *Methodist Episcopal Church Home v. Thompson*, 20 Jones & S. 321; *Bayliss v. Stimson*, 21 Id. 225; 1 Dart on Vendors, 6th ed., 222. A vendee in an executory contract for the purchase of land has not an absolute right to a specific performance of the contract, but such relief is granted or refused, according to the circumstances of each case: *Peters v. Delaplaine*, 49 N. Y. 362; *Day v. Hunt*, 112 Id. 191; Fry on Specific Performance, 3d Am. ed., 10, sec. 25; Pomeroy on Specific Performance, p. 4, sec. 4; p. 47, sec. 35. The fact that all of the heirs of Arthur McGeer were infants at the date of his death, May 25, 1825, and that the youngest did not become of full age until 1843, is not a legal excuse, in an action to enforce a specific performance of the contract, for their failure to perform the contract of their ancestor; and the laches which would have barred such an action by him will bar a like action prosecuted by them: *Havens v. Patterson*, 43 N. Y. 218.

Paulding having purchased without actual notice of the suit, or of the alleged claim of the McGeers, he was a purchaser in good faith, and acquired a perfect title, unless he was bound by the bill in equity, and the accompanying notice of the pendency of the suit. His grantee (the defendant

herein) succeeded to all of his rights; and a purchaser from the defendant, though purchasing with notice of the suit and of the claim of the McGeers, would acquire a perfect title, free from their claims: *Bumpus v. Platner*, 1 Johns. Ch. 213; *Varick v. Briggs*, 6 Paige, 323; affirmed 22 Wend. 543; *Griffith v. Griffith*, 9 Paige, 315; *Webster v. Van Steenberg*, 46 Barb. 211; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62; 1 Story's Eq. Jur., sec. 410; 2 Pomeroy's Eq. Jur., sec. 754. Paulding's title, and the title of purchasers subsequent to him, not being weakened or affected by actual notice of the suit, it becomes important to inquire as to the effect of these papers found on file; or for how long a dormant suit, and a statutory notice of its pendency, binds subsequent purchasers for value, and without actual notice.

The rule that a purchaser, *pendente lite*, of the subject of the litigation, if he buys in good faith, and without actual notice of the claims of the litigants, is not affected by the suit pending, or by the notice of its pendency, unless the suit has been prosecuted with due diligence, was first formulated by Lord Bacon.

"12. No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice": Ordinance 12 in Chancery; 15 Bacon's Works, 353.

The learned editors of Bacon's Works, Spedding, Ellis, and Heath, say that the main body of these ordinances must have existed previous to the time of Lord Bacon in some shape or other, written or unwritten: 14 Bacon's Works, 160. It may be safely asserted that this rule is as ancient as the earliest reported decisions of the court of chancery, and it continued to be the rule of the English courts until 1839: *Preston v. Tubbin*, 1 Vern. 286; *Sorrell v. Carpenter*, 2 P. Wms. 482; *Kinsman v. Kinsman*, Tam. 399; 1 Russ. & M. 617; 2 Sugden on Vendors, 7th Am. ed., 544, *1045, p. 24; 2 Fonb. Eq. 153. In 1839 it was enacted (chapter 11, 2 & 3 Vict., amended by chapters 15, 18, & 19 Vict.) that a *lis pendens* should not bind a purchaser or mortgagee *pendente lite* without express notice

thereof, unless a notice of the pendency of the suit should be registered, and that the registered notice should become void at the expiration of five years unless it should be reregistered. Since the passage of this statute, the effect upon purchasers and encumbrancers, *pendente lite*, of a lack of diligence in prosecuting suits, has ceased to be, in England, a living question, and only occasional reference to the subject will be found in modern English law-books. We do not find that this rule has ever been questioned in this state; but on the contrary, it has been approvingly cited and applied: *Murray v. Ballou*, 1 Johns. Ch. 566; *Hayden v. Bucklin*, 9 Paige, 512; *Myrick v. Selden*, 36 Barb. 15; Willard's Eq. Jur. 251. The courts of other states have asserted and followed the rule: *Herrington v. McCollum*, 73 Ill. 476, 483; *Watson v. Wilson*, 2 Dana, 406; 26 Am. Dec. 459; *Clarkson v. Morgan*, 6 B. Mon. 441, 448; *Debell v. Foxworthy*, 9 Id. 228; *Erhman v. Kendrick*, 1 Met. (Ky.) 146; *Petrie v. Bell*, 2 Bush, 58; *Ashley v. Cunningham*, 16 Ark. 168; *Mann v. Roberts*, 11 Lea, 57; *Bybee v. Summers*, 4 Or. 354.

The text-writers state the rule as laid down in the cases cited: 2 Pomeroy's Eq. Jur., secs. 634, 640; Wade on Notice, secs. 357, 359; Bennett on Lis Pendens, sec. 418.

The right of a plaintiff to revive and continue an action against the successors in interest of a deceased defendant may be lost by long delay in making the application, and especially if the successors are purchasers in good faith, and if the condition and value of the property have greatly changed, and the only witnesses by which the facts in issue could be established are dead: *Coit v. Campbell*, 82 N. Y. 509; *Lyon v. Park*, 111 Id. 350. For sixty-one years prior to April 15, 1885, the date fixed for the performance of the contract of sale, the defendant and his grantors had been in the exclusive possession of the lots, claiming to own the entire estate by virtue of recorded deeds, which in terms conveyed the entire estate. No move has been made in the chancery suit adverse to the defendants therein since April 26, 1838, sixteen years before Paulding became a purchaser in personal good faith, and more than forty-six years before the plaintiff in this action purchased. Gertrude Kemble Paulding, one of the defendants, died May 25, 1841, forty-four years before the plaintiff's purchase; her husband died April 6, 1860, twenty-five years before the plaintiff's purchase; Gouverneur Kemble died September 18, 1875, nearly ten years before the plaintiff's

purchase, and William Kemble died November 5, 1881, nearly four years before the plaintiff's purchase. It is apparent that the condition and value of the property have greatly changed. It was contracted to be sold in 1819 for twelve hundred dollars, and it sold to the plaintiff for twenty-six thousand one hundred dollars. It is alleged in the bill, and is conceded in the answer in the chancery suit, that the business between Arthur McGeer, the vendee, and Peter Kemble, the vendor, was transacted by William Kemble, who is dead. On the twenty-fifth day of March, 1885, the complainants in the suit in chancery, if living, and if dead, their successors in interest, were, by well-settled rules of law, effectually barred from reviving and continuing their suit against the defendant in this action, who then had a good title to the lot; and the plaintiff had no valid reason, in law or in equity, for failing to perform her contract. Having held that the suit in chancery, and the papers filed in connection therewith, created no defect in the title or lien upon the property, it is unnecessary to discuss the failure of the defendant to disclose their existence to the purchaser.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

LIS PENDENS. — *Lis pendens* is merely notice to all persons within the jurisdiction of the state of matters litigated, and will prevent a third person from acquiring an interest by purchase which can affect the plaintiff's rights: *Powell v. Williams*, 14 Ala. 476; 48 Am. Dec. 105; *Shelton v. Johnson*, 4 Sneed, 672; 70 Am. Dec. 265.

LIS PENDENS. — To justify the application of the doctrine of *lis pendens*, the prosecution of the suit must have been close and continuous: *Trumble v. Boothby*, 14 Ohio, 109; 45 Am. Dec. 526; compare *Gossom v. Donaldson*, 18 B. Mon. 230; 68 Am. Dec. 723.

LACHES. — A delay of twenty years to take any action to set aside a deed claimed to have been obtained by fraud is fatal to complainant, though he was, during that time, a habitual drunkard: *Wright v. Fuller*, 65 Mich. 279; 8 Am. Rep. 886, and note; note to *Bell v. Hudson*, 2 Id. 800-808; note to *Reynolds v. Sumner*, 9 Id. 530, 531. Where a right of action accrues to one under no disability, but who dies without bringing suit, the statute of limitations continues to run, notwithstanding the disability of one claiming under the deceased: *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814, and note 822.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

COUNTY BOARD OF EDUCATION v. BATEMAN.

[102 NORTH CAROLINA, 52.]

OFFICE AND OFFICER — OFFICIAL BONDS. — Where a statute imposes the duty of receiving and disbursing a new fund upon certain county officers, but makes no provision for an additional bond to secure the faithful application of such fund, any bond given by the officer after the statute is in force, though in terms providing only for securing the faithful discharge of official duty, and accounting for money received by virtue of his office, will be construed to embrace the new duty, and to constitute a security for its performance. But when the statute imposing the new duty requires, in express terms, an additional bond for its faithful performance, a bond already required of the officer, and conditioned for the faithful discharge of the duties of his office, will not embrace the new duty.

OFFICIAL BONDS — LIABILITY ON. — **BONDS EXECUTED BY COUNTY TREASURER** as provided by North Carolina code, section 766, and conditioned that he "shall well and truly account for all moneys that may come into his hands by virtue of his office," and faithfully execute the duties of his office, do not cover the duties imposed upon him by section 2554 of the code, which requires him to receive and disburse all public school funds, and to execute a "justified treasurer's bond," "conditioned for the faithful performance of his duties as treasurer of the county board of education," etc., and for any breach of which, action shall be brought by said board. And the board of education cannot maintain an action for the misapplication of the school funds by him, as treasurer of the board of education, on the bonds executed by him as county treasurer.

ACTION by the county board of education of Chowan County against A. J. Bateman, treasurer of said county. Bateman, as treasurer, filed two bonds on the same day, and containing the same conditions, but different penal sums, and signed by different sureties. The complaint alleged that by virtue of

his office as treasurer, Bateman received from the sheriff of the county, and from other sources, for and on account of the school fund of the county, a large sum of money, a balance of which he utterly failed to account for and pay over according to law. The defendants demurred as follows: "1. This action is brought to recover an alleged balance due on the school fund by said Bateman as treasurer of the county board of education, and it is not alleged in the complaint that Bateman ever qualified as treasurer of said board, or that these defendants ever executed any bond to cover a discharge of his duties as treasurer of said county board of education; 2. That the conditions of said bonds set out in the complaint show they were executed to cover only the duties of Bateman as general county treasurer, and were not executed to cover any duties of Bateman as treasurer of the said board of education, and no breach of his duty as general county treasurer is assigned in the complaint; 3. For that it appears from said bonds that they were cumulative bonds to secure a safe handling of the general county fund, and no failure to pay over any part thereof is alleged." The demurrer was overruled, with costs to the plaintiff, and the defendants appealed.

W. D. Pruden, for the plaintiff.

W. M. Bond, for the defendants.

AVERY, J. By a series of adjudications, extending over more than fifty years, we think that the principles governing this case have been clearly settled.

When a law is enacted that imposes the duty of receiving and disbursing a new fund upon the sheriffs or treasurers or other officers of counties, and the statute fails to provide that an additional bond, conditioned for securing the faithful application of such fund, shall be required, any bond given by the officer after the law is in force, though in terms it may provide only for securing the faithful discharge of official duty and accounting for money received by virtue of his office, will be construed to embrace the new duty, and to constitute a security for its performance: *State v. Bradshaw*, 10 Ired. 229.

In that case the facts were, that the sheriff of Rowan County and his sureties were sued on his official bond, executed in the year 1847, and conditioned that "he shall pay all money by him received, by virtue of any process, to the person or persons to whom the same shall be due, and in all other things will truly and faithfully execute the said office of sheriff dur-

ing his continuance therein." The defendants, his sureties, were held to be liable for a tax levied by the proper authorities of the town of Salisbury, because an act passed in the year 1827 required the sheriff of Rowan County "to collect, pay over, and account for the taxes imposed by the commissioners of the town of Salisbury, on citizens and property therein," etc. (but did not require a new bond), and the sheriff had failed to account for tax collected for the town in 1847.

In the case of *Lindsay v. Dozier*, Busb. 275, the court held, in effect, that where an officer had given a bond for the faithful discharge of his duties, after the enactment of the law intrusting him with the collection and disbursement of an additional fund, such bond would be deemed a security for the performance of the new duty, unless the statute imposing it in express terms required a separate bond for the performance of that new duty. The act of 1844 required each county to levy a tax for the common school fund, and the sheriff was directed to collect it "in the same manner that other county taxes are now levied for other county purposes," and in the same section it was provided that the bond given by the sheriff to secure the county taxes "shall contain a condition for the faithful collection and payment of the school taxes to the person authorized to receive the same." The sheriff, Dozier, filed a bond, conditioned only for the collection of all county taxes, and the action brought against him and his sureties on that bond for the school fund, collected by him and not accounted for, was sustained by the court.

On the other hand, where a law charging an officer with a new duty requires in express terms an additional bond for its faithful performance, or one embodying conditions different from those necessary in that already required, an official default in misapplying funds received by virtue of such statute is not held to be a breach of the bond conditioned for the faithful discharge of the duties of the office, even when it embraces the new duties only in general, and not in specific terms: *Crumpler v. Governor*, 1 Dev. 52; *Governor v. Barr*, 1 Id. 65; and *Governor v. Matlock*, 1 Id. 214.

Chief Justice Ruffin cited these cases in *State v. Bradshaw*, *supra*, as establishing the rule, "that the general words in the conclusion of the general bond of the sheriff did not extend to the public and county taxes." As a reason for the rule, he says: "The construction was that those words were, upon the

intention, not cumulative, but special, securities for the revenue of each kind, inasmuch as if it were not so, the interests of the public and private persons would often come in conflict; and indeed the penalty of the bond would often be exhausted by the public leaving nothing, or but little, as a security to individuals." If we apply the principles stated in and deduced from the opinions referred to, there will be little trouble in reaching a conclusion as to the correctness of his honor's ruling. We are of the opinion that the demurrer should have been sustained.

Two bonds were filed by the defendant Bateman on the same day, and containing precisely the same conditions, but different penal sums, and signed by different sureties. The conditions in both bonds were, that the said A. J. Bateman "shall well and truly account for all moneys that may come into his hands by virtue of his office, and shall faithfully perform all things pertaining to his office required of him by the laws of North Carolina, or any other authority by virtue of said laws," otherwise to remain in full force and virtue.

The code of North Carolina (vol. 1, c. 19, sec. 766) provides that the county treasurer shall give bond, "conditioned that he will faithfully execute the duties of his office, and pay, according to law and on warrant of the chairman of the board of commissioners, all moneys which shall come into his hands as treasurer, and render a true account thereof to the board, when required by law or the board of county commissioners."

Section 2554 of the code provides that "the county treasurer of each county shall receive and disburse all public school funds," and he is further required to execute a "justified reasurer's bond," etc., "conditioned for the faithful performance of his duties as treasurer of the county board of education, and for the payment over to his successor of any balance of school money that may be in his hands unexpended, etc., . . . and for any breach of said bond action shall be brought by the county board of education."

It is almost needless to state that neither of the bonds declared on in this action purports to have been executed by Bateman and the other obligors to provide for the misapplication of the school fund received by him in the capacity of treasurer of the county board of education, and the condition of both are widely variant in form and substance from those prescribed in section 2554. Whether both are so drawn as to substantially meet the requirements of section 766, is a ques-

tion that we are not called upon to decide now; but if they are sufficient in form to bind the obligors as to any default of Bateman, acting generally in the capacity of county treasurer, we must, according to the authorities cited, hold that they are cumulative obligations, and that the sureties, who executed both, are liable only for some default of Bateman as relating to his office as county treasurer proper, and not as treasurer of the board of education.

Indeed, section 2554 requires that the bond mentioned in that section shall be executed before entering upon the duties of his office, and the board of education has the right, if necessary, to require the treasurer to strengthen it on notice. The plaintiff might have critically examined the obligations filed by Bateman, and have refused to intrust him with the disbursement of school funds until the law had been complied with.

The case of *Commissioners v. Magnin*, 86 N. C. 285, sustains the view we have taken of this case. The county treasurer was, by the law then in force (Battle's Revision, c. 68, secs. 32, 34, 35), made *ex officio* county treasurer, and as such required to give a bond conditioned for the faithful performance of his duty as treasurer of the county board of education. The bond, for an alleged breach of which the action was brought, recited the fact that Magnin had "become disburser of the school money" by virtue of his appointment as county treasurer, and the question discussed by the chief justice in that case was, whether the loosely drawn condition, "to well and truly disburse the money coming into his hands under the requirement of law" (referring to Magnin as "disburser of the school money"), could be construed to cover the alleged defalcation in the failure of Magnin to account for and pay over to his successor school funds received by virtue of his office, and the court held that Magnin was liable. The discussion as to the form of that bond probably suggested the changes in the law as now embodied in section 2554.

For the reasons stated, the judgment is reversed, and the court below will proceed in accordance with this opinion.

OFFICE AND OFFICERS—OFFICIAL BONDS.—A bond requiring faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in it: *State v. Newin*, 19 Nev. 162; 3 Am. St. Rep. 873.

OFFICIAL BONDS—EFFECT OF LEGISLATIVE ALTERATION OF THE DUTIES OF AN OFFICER to discharge the sureties upon his bond: Note to *People v. Vilas*, 93 Am. Dec. 526-528; note to *Pratt v. Wright*, 67 Id. 771-775.

SAWYER v. BRAY.

[102 NORTH CAROLINA, 79.]

EXECUTIONS — VALIDITY OF LEVY ON PERSONAL PROPERTY. — As against all persons, except junior execution creditors, a levy upon personal property is good and valid, where the officer goes to the property so as to have it in his power to take it into actual possession, if he chooses, and indorses the levy on his process. But as against junior execution creditors, the lien of the levy is lost, unless the officer takes the property, and retains actual possession thereof, either in person or by his agent, until a sale.

EXECUTIONS. — To PROTECT BONA FIDE PURCHASERS FOR VALUE, AND OTHER EXECUTION CREDITORS, it is provided by the North Carolina code, section 448, that the lien of an execution, as to them, shall operate only from the levy; but this provision does not change the existing law as to what shall constitute a levy, nor alter the character and effect of the lien acquired by it.

ONE Griggs, a debtor, conveyed a stock of goods in store to the plaintiff, Sawyer, in trust, to pay the indebtedness therein named. Sawyer took possession, and proceeded to execute the trust, having employed one Snowden to assist him, and in whose charge he put the property. The defendant, Bray, sheriff of the county, in Sawyer's absence, went to Snowden, and represented that he had several executions which had been levied before the conveyance to the plaintiff, and that he was entitled to the proceeds received from the sale. Snowden paid him the amounts due on the executions, and this action was brought to recover the amount so paid. It was alleged by the defendant that his deputy had gone with the executions to the store of Griggs before the conveyance, and had then made levies on the goods, and had put them in the possession of Snowden, as said deputy's agent, for preservation. Whether the levy under the executions was sufficient, and took priority over the deed of assignment, was the principal question to be determined. The judgment was for the plaintiff, and the defendant appealed.

E. F. Aydlett, for the plaintiff.

W. B. Shaw, for the defendant.

SHEPHERD, J. Several exceptions were taken to the charge of his honor; but the one which was chiefly relied upon in this court, and which is sufficient to dispose of this appeal, is embraced in the instruction that "even if the deputy did levy, unless he retained possession either by himself or his agent, the lien of the levy was lost, and the deed of assignment, if

made and registered when there was no levy on the property, conveyed a good title to the goods to the plaintiff."

The ruling of the court finds apparent support in the language of Ruffin, C. J., in *Roberts v. Scales*, 1 Ired. 88. He says "that the true principle therefore is, as we think, that the property of a debtor, as against creditors, ought not, by operation of law, to be divested and vested in the sheriff, but by some act as obvious and notorious as the nature and state of the property will permit. That, in the case of ordinary personal chattels like the present, is effected by taking and keeping possession, and by that only, and therefore it is required. . . . The execution only creates a lien; the taking possession carries the property. Then *e converso* the property which was gained by possession also goes with it."

It will be observed that the foregoing case was one where the debtor was permitted to remain in possession after the levy; and it was held that the levy and actual seizure of the goods under a junior execution prevailed. We cannot believe that the chief justice meant to decide that there could be no levy, or that the levy was, in law, abandoned, unless the goods were retained in the actual possession of the officer or his agent; for he is careful to restrict his general expressions as to what shall constitute a levy by using the significant words, "as against creditors." This view is sustained by his opinion in *Mangum v. Hamlet*, 8 Ired. 44, where he recognizes the validity of such a levy by holding that although the sheriff leaves the property in the possession of the debtor, he has such a special property therein as to sustain an action of trover against one who wrongfully converts it. In that case, the defendant moved the court to "instruct the jury that by leaving the property in the debtor's possession, the plaintiff [a constable] abandoned his levies." The court refused to give the instruction, and the ruling was sustained upon appeal. All doubt upon this point, however, is removed by Pearson, J., in *Bland v. Whitfield*, 1 Jones, 122. He says that, "in regard to personal property, it is necessary for the officer to go to it, so as to have it in his power to take it into actual possession, if he chooses. It is safest for him to do so, and carry it away, for then he can hold it against all persons; but it is not necessary for him to do it, or for him to touch the property; the levy is perfected by his making the indorsements upon the execution. He may leave the property in the possession of the debtor and take a forthcoming bond, or

he may leave it there without any bond, and the effect of the levy is to give him such an interest and possession, in contemplation of law, as will enable him to bring trespass against any one who interferes with it, except another officer."

So it clearly appears that what was said in *Roberts v. Scales*, *supra*, referred only to cases where the rights of junior execution creditors were involved. Notwithstanding the plain and emphatic words in the latter part of the above quotations to the effect that the exception is only applicable to "another officer," the plaintiff insists that he stands upon the same footing as a junior execution creditor who seizes the property while in the possession of the debtor. The distinction between the two, in this respect, runs through all of our decisions, and we cannot conceive how section 447, subsection 1, of the code, relied upon by the plaintiff, affects it.

Ruffin, C. J., in *Harding v. Spivey*, 8 Ired. 63, in speaking of the preference given a junior execution creditor, where the senior execution creditor prevents his execution from being acted on, says "that this reasoning has no application to an alienation by the debtor himself, for that, on the other hand, is considered a fraud by the debtor, as tending to defeat the process of the law for the recovery of judgment debts, because, from necessity, the rule, as to him, is *caveat emptor*." And in *Finley v. Smith*, 2 Id. 225, he says: "Indeed, the law decrees the alienation of property subsequent to the *teste* of a *feri facias* to be itself fraudulent, since it tends to defeat the process of the law." At common law, a *feri facias* bound the property of the debtor so as to avoid any alienation by him; and this law prevailed in our state until the adoption of the Code of Civil Procedure. Up to that time, the simple issuing of a writ of *feri facias* bound the property from its *teste*, and, if followed by a levy, it was held sufficient to defeat the rights of innocent purchasers, who bought before the levy: *Grant v. Hughes*, 82 N. C. 216; *Harding v. Spivey*, *supra*.

In England, the law was changed by 29 Charles II., so that the lien only commenced from the delivery of the writ to the sheriff. Of this act, the chief justice, in *Harding v. Spivey*, *supra*, says: "But it may be remembered that that only changes the period to which the lien relates from the *teste* to the delivery of the writ still creating a lien before the seizure of the property, and therefore still applying the maxim *caveat emptor*."

In this state, we have advanced a step further, and for the

purpose of protecting *bona fide* purchasers for value and other execution creditors, we have provided (Code, sec. 447, subsec. 1) that the lien as to them shall operate only from the levy. This act does not profess to change the existing law as to what shall constitute a levy, nor does it alter in any respect the character and effect of the lien acquired by it, as already determined by a long series of decisions in our reports. This rule may work hardship in some cases, and may be a proper subject for additional legislation. So far it has only been deemed necessary to change the time when the lien shall commence.

This is an improvement upon the old law, for there is no notoriety in the mere issuing of the writ of *feri facias*, while the actual presence of the sheriff, his seizure of the property, the making of the indorsement, and other attending circumstances are generally sufficient to put purchasers upon their guard.

We are of the opinion that his honor erred in giving the instruction complained of, and that a new trial should be awarded the defendant.

EXECUTIONS. — The lien of an execution relates to its *teste*, and attaches to all personalty owned by the defendant between the *teste* and the levy, so as to defeat the title of all intermediate purchasers: *Edwards v. Thompson*, 85 Tenn. 720; 4 Am. St. Rep. 807; but in *Knaz v. Webster*, 18 Wis. 406, 86 Am. Dec. 779, and note, it is held that an execution becomes a lien upon chattels only from actual levy. And so it has been held in California: *Johnson v. Gorham*, 6 Cal. 195; 65 Am. Dec. 501; and in Iowa: *Reeves v. Sebern*, 16 Iowa, 234; 85 Am. Dec. 513. Compare note to *Farley v. Lea*, 32 Am. Dec. 683.

EXECUTIONS — LEVY — PERSONALTY. — To constitute a valid levy upon personalty, the officer must assert such dominion over it as would, without the authority of his writ, amount to an actual or constructive trespass: *Goode v. Longmire*, 35 Ala. 668; 76 Am. Dec. 309; *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 206; *Bradley v. Kesse*, 5 Cold. 223; 94 Am. Dec. 246; *Weatherby v. Covington*, 3 Strob. 27; 49 Am. Dec. 623; *Beekman v. Lansing*, 3 Wend. 446; 20 Am. Dec. 707; *Westervelt v. Pinckney*, 14 Wend. 423; 28 Am. Dec. 516; *Friberg v. Johnson*, 71 Tex. 558. That a levy upon personalty may be valid, the sheriff must ordinarily take actual possession thereof: *Portis v. Parker*, 8 Tex. 23; 58 Am. Dec. 95; *Beekman v. Lansing*, 3 Wend. 446; 20 Am. Dec. 707; *Brown v. Pratt*, 4 Wis. 513; 65 Am. Dec. 330; *Newman v. Hook*, 37 Mo. 207; 90 Am. Dec. 378. To constitute a levy, seizure is necessary; but if from the nature of the property an actual seizure is impossible, some act as nearly equivalent to a seizure as practicable must be substituted for it: *Long v. Hall*, 97 N. C. 286.

HOOKER v. SUGG.

[102 NORTH CAROLINA, 115.]

INSURANCE — CONSTRUCTION OF LIFE POLICY. — Rules for interpreting the will of a testator may guide, as far as they are applicable, in ascertaining the legal effect of the clause in a life policy designating the beneficiaries. The difference in the cases consists in the fact that the interest vests under the policy at once upon its issue, but does not vest under the will until the death of the testator.

INSURANCE — POLICY OF LIFE INSURANCE CREATES VESTED INTEREST IN BENEFICIARIES DESIGNATED THEREIN, and although the contract may be annulled by the company in case of the failure on the part of the insured to fulfill his contract stipulations, the insured himself is without the power of revocation, and the disposal of the fund, while the policy remains in force, is not under his control.

INSURANCE. — IF "CHILDREN" BE DESIGNATED IN A LIFE POLICY AS BENEFICIARIES, the interest vesting at once is in such as then meet the description, and is not divested in favor of survivors by a death afterwards.

INSURANCE — LIFE POLICY FOR BENEFIT OF WIFE AND CHILDREN — CONSTRUCTION. — A life policy was issued, payable at the death of the insured to "his wife and children," without other designation. He surrendered this policy, and took a paid-up policy for the benefit of the beneficiaries, and also another policy in the same company, similar to the one surrendered, and for the benefit of "his wife and children," although when the last policy was issued his wife was dead. In such case, the last policy did not continue in force the one it superseded, and it should be construed in accordance with the then existing conditions, giving the entire fund to the surviving child and the administrator of the deceased one, the provision for the deceased wife being nugatory and unavailing.

INSURANCE — CONSTITUTIONAL LAW. — Provision in North Carolina constitution, article 10, section 7, which authorizes a husband to insure his life for the benefit of his wife and children, clearly looks to a provision for them, so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive.

AGREED case. The facts appear in the opinion. The judgment was for the plaintiffs, and the defendant appealed.

J. I. Jackson and George V. Strong, for the plaintiffs.

Theodore Edwards and G. M. Lindsey, for the defendant.

SMITH, C. J. J. T. Freeman, in the year 1867, obtained from the Aetna Life Insurance Company of Hartford, in the state of Connecticut, a policy of insurance upon his life, for the sum of five thousand dollars, to be paid at his death to "his wife and children," the premiums on which were to be paid annually, one half in money and the other half secured by his note. At the time of the issue of the policy he had a

wife, Leora, then living, and two children, their offspring, John H. Freeman, and E. Hokie Freeman, who intermarried with John F. Hooker.

After the death of the said Leora, some time in 1873, under an arrangement between the company and J. T. Freeman, the policy was surrendered to the company and a paid-up policy for the sum of \$320 issued in its place, and in consideration of the premium theretofore paid, which sum was in like manner made payable to "his wife and children," without, as in the previous one, designating any one by name.

At the same time a second life policy was taken out, for the same sum and essentially in the same terms, payable, without naming them, to "his wife and children," differing from the former in requiring the annual premiums all to be paid in cash, the company having made this change, as to the payment of premiums, in the form of their life policies.

The son, John H., died during the lifetime of his father, leaving a will, in which he disposed of his whole estate, and the defendant, John Sugg, has taken out letters of administration with the will annexed on the testator's estate.

The *feme* plaintiff and her brother paid the premiums on the last policy up to the death of her brother, and herself alone the premiums thereafter to her father's death, in the sum of \$297, and it is agreed that she shall be reimbursed out of the funds derived under that policy.

J. T. Freeman died in 1888, intestate, and letters of administration on his estate, as well as on his wife's, have also issued to the defendant. The company has paid both the sum agreed on in the paid-up policy and the entire amount due on the last policy, to the defendant, to be held subject to the rights of the parties therein. J. T. Freeman died largely indebted and insolvent, but there are no debts outstanding against the estate of his deceased wife, Leora.

The foregoing facts are submitted to the judge for his decision of the conflicting claims, asserted in the pleadings, to the fund, and it is agreed that if he shall sustain the plaintiffs' contention, he shall enter judgment for one half of the \$5,000, after deducting \$297 due for premiums paid by her, which shall be added to the *feme* plaintiff's moiety of the residue; if he shall rule in favor of the defendant, he shall enter judgment for the plaintiffs for one third of the \$5,000, reduced by the amount of the premiums so paid by the *feme* plaintiff.

Upon the hearing of the cause, was entered the following judgment:—

“From the facts agreed upon and submitted by the parties in this action, the court is of opinion, and so adjudges, that the plaintiffs are entitled to recover one third of the \$320 received by the defendant from the paid-up policy, and the defendant, as administrator of Leora Freeman, deceased, and as administrator with the will annexed of J. H. Freeman, deceased, is entitled to the other two thirds of that sum.

“And the court is further of the opinion, and so adjudges, that the plaintiffs, as agreed upon by the parties, are entitled: 1. To be paid out of the five thousand dollars received by the defendant from the five-thousand-dollar policy, one half of the amount of the premiums paid by the *feme* plaintiff on said policy, with interest on same from the time such premiums were paid; 2. Are entitled to recover one half of the remainder of said five thousand dollars.

“And the defendant, as administrator with the will annexed of J. H. Freeman, deceased, is entitled to the balance of said five thousand dollars.

“These plaintiffs will recover their costs in this action, to be taxed by the clerk.”

The premiums having been paid in equal parts by the daughter and son up to his death, and by her alone since, in the several sums and at the several dates set out in the complaint, for which she is to be reimbursed those several sums, and not the half of each, as ruled by the judge under a misapprehension of the terms of the concession, with interest on separate portions, which make the aggregate of \$297, must be allowed the *feme* plaintiff, and deducted from the full amount of the insurance. With this correction, there is no error in that part of the ruling.

The question as to the distribution of the sums paid upon the surrendered policy is not submitted to the judge, and we suppose is not a subject of controversy, and consequently the ruling is confined to the distribution of the other fund. If the contention be sustained, that will entitle the wife to a share of it, as she would be if living at the time when that insurance was effected, it would go to her administrator, and the defendant being both her and her husband's representative, there being no debts of hers to be provided for, it would be held by the defendant in his latter capacity, and become liable to his debts.

The provision in the constitution, article 10, section 7, which authorizes such an insurance for the benefit of the wife and children, not as yet regulated by statute, clearly looks to a provision for them, so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive.

The defendant's counsel maintain the proposition that the substituted policy takes the place of the other, and inures to the advantage of the same beneficiaries as would the first have done if it had been kept up according to its terms, the effect of which would be to subject the wife's share, as suggested, to her husband's debts, a result which it was his intention to guard against; and yet this would have followed but for the renewal. The terms of the policy constitute a contract of the company to pay the specified amount to the beneficiaries designated, and create direct legal relations between them.

How could this be in regard to the wife, no longer living? and how can it be supposed that he intended to provide for her? The new policy supersedes, but does not continue in force, that whose place it takes, and must be construed in accordance with the then existing conditions. Inadvertently, perhaps, but if inserted intentionally, the insertion of the wife as a beneficiary is a nullity, so far as it may have reference to the deceased, and could only have operation as a reference to one whom he might afterwards marry, and thus bring within the terms of the policy.

It is unnecessary to consider the possible effect of a future marriage upon the interests of the children, since the event did not take place.

There are but two aspects presented in the case before us, in the one of which the one third lapses and returns to the husband as undisposed of, and in the other, the entire sum belongs to the children, and we concur with the court in the ruling in their favor.

In *Conigland v. Smith*, 79 N. C. 303, the relations of a parent, who insures his own life for the benefit of his children, to them, are deemed analogous to those assumed when providing for them by a testamentary disposition of his property, both being posthumous benefits secured, and hence the rules for interpreting the will of a testator may guide, as far as they are applicable, in ascertaining the legal effect of this clause in the policy. The difference in the cases consists in the fact that

the interest vests under the policy at once upon its execution, while it does not under the will until the death of its maker, and hence we do not concur in the opinion delivered by Rodman, J., so far as it concedes a power of revocation to reside in the party insuring. The contract may be annulled by the company in case of the failure of the other party to fulfill his contract stipulations, but the disposal of the fund while the policy remains in force is not under his control: *Bliss on Life Insurance*, 2d ed., 517; *Fortescue v. Barnett*, 3 Myl. & K. 36; *Otis v. Beckwith*, 49 Ill. 121, and cases cited.

As the attempted securing a share to the deceased wife is nugatory and unavailing, there seems to be no alternative but to give the entire fund to the living daughter and administrator of the deceased son; for it is evident the entire sum was intended for none other, and being void as to one, the provision inures wholly to the others.

In case a legacy is given to a class of persons, as to tenants in common or to children, in the case of the death of one before the vesting, it inures to the survivors of the class: 2 *Williams on Executors*, 882; *Toller on Executors*, 303.

So if children be designated in a life policy as beneficiaries, the interest vesting at once is in such as then meet the description, and is not divested in favor of survivors by a death afterwards.

We have not been able to find an adjudged case shedding light upon the construction of the like or similar words found in defining the parties for whose benefit a life policy has been taken out; but our conclusions seem to be a fair and reasonable interpretation of the clause before us, as it certainly subserves the ends that the father had in view in securing this fund to his family, constituted, in this case, of his son and daughter.

Subject to the correction which makes the advances of the daughter to be paid in full, and not a moiety only, the judgment is affirmed.

RESULTS OF THE DEATH OF A BENEFICIARY BEFORE THE DEATH OF A PERSON WHOSE LIFE IS INSURED. — In *Conyland v. Smith*, 79 N. C. 303, cited and approved in the opinion to the principal case, a father insured his own life "for the benefit of his children." One of his children, a daughter, married, and died without issue; and it was held that her husband was entitled, as her administrator, to her share of the money arising from the policy of insurance, upon the death of the father. The court observed: "The policy was a contract between the company and the assured; he might, at his

AM. ST. REP., VOL. XL — 45

pleasure, have forfeited or surrendered it, just as a testator may revoke his will while he lives; but the sum to be paid under it was a gift to his children, which vested in interest when the policy was delivered, and, the policy being in force at his death, vested in possession then." So, according to the great weight of authority, a life policy of insurance creates a vested interest in the beneficiary or beneficiaries therein named. It is the creation of an irrevocable trust: See *Gould v. Emerson*, 99 Mass. 154; 96 Am. Dec. 720; *Unity etc. Ass'n v. Dugan*, 118 Mass. 221; *Ruppert v. Union Ins. Co.*, 7 Rob. (N. Y.) 155; *Fraternal Ins. Co. v. Applegate*, 7 Ohio St. 292; *Bailey v. New England etc. Ins. Co.*, 114 Mass. 177; 19 Am. Rep. 329; *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156. And where a husband had taken a policy upon the life of his wife, payable to himself, or in case of his death before the wife, to his children, and he died before the wife, it was held that at his death he had a vested interest in the policy, and that, by his will, it went to the wife. In such case, an interest vests in the payee, during the lifetime of the person whose life is insured, so as to be the subject of testamentary disposition, notwithstanding such interest is liable to be defeated by a subsequent contingency: *Keller v. Gaylor*, 40 Conn. 343. So a wife procured a policy upon the life of her husband, payable to her if living, if not, to her children. Both she and one of the children died before the husband; and it was held that a transmissible interest vested in the children upon the issuing of the policy, and that the heirs of the deceased child took by descent its interest, and were entitled to a portion of the amount assured: *Continental Life Ins. Co. v. Palmer*, 42 Id. 60; 19 Am. Rep. 530. So in a case similar to the last, it was held by the same court that a policy of insurance on the life of the husband, payable to the wife for her sole use, and in case of her death before her husband, to be paid to her children, was not assignable by her so as to defeat the interest of her children, which, subsequently to such assignment, became absolute by the death of their mother and the death of the husband: *Connecticut Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305. So in New York, a policy was issued to a married woman on the life of her husband, made under the statute of that state, for her benefit and that of her children, in case of her death. She assigned the policy in the lifetime of her husband, and survived him. In a suit to which she was a party, the court held that the instrument had no assignable quality, and could not be transferred so as to divest the interest of the wife or her children: *Hadie v. Slimmon*, 26 N. Y. 9. In another Connecticut case, a policy was issued upon the life of the husband, payable to the wife, or in case of her death, to her children. The wife died before her husband, and after her death, the husband surrendered the policy, and took another for the same amount, date, and premium, but payable to himself. He paid one year's premium, and died insolvent. In a contest between the children and the husband's creditors, it was held that the husband had no right, without the consent of the children, thus to surrender the old policy, and take the new one, payable to himself, and that the children were entitled to the amount due on the latter policy: *Chapin v. Fellowes*, 36 Conn. 132; 4 Am. Rep. 49. So in a Minnesota case, a husband had procured a policy of insurance on his life, payable to his wife, if living, otherwise to his children, or their guardian. After the death of the wife, leaving children, and a remarriage by the husband, he surrendered the original policy, and a new one was issued in its place as a substitute therefor, bearing the same date, and containing the same terms and conditions, except a provision that it should inure to the sole use and separate benefit of the second wife. It was held

that the husband had no right to thus change the policy without the consent of the children, and that "his children," including the issue of both marriages, were entitled to the avails of the new policy as against the second wife: *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193; 38 Am. Rep. 289. In a recent Maine case, a policy had issued on the life of a husband, payable to his wife, her heirs, representatives, and assigns. The wife paid premiums. After her death, the husband and the company allowed the policy to lapse, and issued a new one, payable to the husband and his representatives. On the husband's death, it was held that the insurance money should be divided between the respective administrators in proportion to the amount of premiums paid by their respective intestates: *National Life Ins. Co. v. Haley*, 78 Me. 268; 57 Am. Rep. 807; and see *Harley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285; *Glanz v. Gloeckler*, 104 Ill. 573; 44 Am. Rep. 94.

While it has been generally held that a policy procured by one on his own life for the benefit of his wife and children, or their representatives, is not assignable by him during the life of any of the beneficiaries (see *Robinson v. Duvall*, 79 Ky. 83), yet it has been held that where a husband survives his wife, having previously procured a policy on his own life for her benefit, and himself paid the premiums thereon, he may dispose of it by will or otherwise: *Kerman v. Howard*, 23 Wis. 108. So it has been held that a life policy taken out by a husband on his own life for the benefit of his wife is assignable during his life, with her consent, as collateral security for his debts, where there is no statute directly prohibiting it, and that she is debarred, by the assignment, from recovering the proceeds of the policy: *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419; 4 Am. Rep. 328. It was held in Indiana that if one insures his life for the benefit of his wife, upon her death her interest in the policy inures to her administrator, and an assignment to another by the husband only passes the husband's interest as his wife's heir. But the assignee, having taken his assignment in good faith, should be reimbursed for the premiums he had paid, with interest: *Harley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285. In an earlier case, the wife had taken out a policy upon the life of the husband, payable to herself, or in case of her death, to her children. The premiums were paid by the wife, and she died before the husband, and without children. In a contest between the administrators representing the respective estates of the husband and wife, it was held that the wife had such an interest in and ownership of the policy and right to the proceeds as would, at her death, descend to her heirs, notwithstanding the husband was living at the time of her death: *Hutson v. Merrifield*, 51 Ind. 24; 19 Am. Rep. 722. These decisions have settled the law in Indiana in accordance with the prevailing doctrine that an insurance policy, issued upon the life of a husband for the benefit of his wife, is her property, and an effectual assignment and delivery thereof to another, even during the lifetime of the husband, can be made only by her: *Pence v. Makepeace*, 65 Ind. 345; *Wilburn v. Wilburn*, 83 Id. 55.

In New York, a husband who procures a policy of insurance on his life for the benefit of his wife, or in case of her death before his, of their children, acts simply as their agent in procuring the policy, and in doing whatever is necessary to perfect and continue the rights of the assured: *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 233. By force of the statute authorizing such insurance, they acquire a vested interest in the policy at the moment of its delivery to the insured, and this is so, although no knowledge of the existence of the policy comes to them until after his death. Without their assent, he may not surrender the policy while it is in force, such an act not being within

the scope of the agency inferable from the taking out of the policy by him: *Whitehead v. New York Life Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787; and see *Olmstead v. Keyes*, 85 N. Y. 593; *Stihwell v. Mutual L. Ins. Co.*, 72 Id. 388; *Thompson v. American Ins. Co.*, 46 Id. 675; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; but if the policy has become forfeited for non-payment of premiums, he may thereafter surrender it: *Whitehead v. New York Life Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787; though the non-payment of premiums after the surrender of a policy in force will not effect a forfeiture as against the beneficiaries who are ignorant of the surrender: Id.; and see *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; 29 Am. Rep. 200.

In a recent Michigan case it was held that the same rules of construction should be applied to dispositions of property created by mutual benefit associations as are applied to bequests by will. The scheme of such an association is to raise a fund which shall pass to designated beneficiaries at the death of the member. The right, which before was inchoate and contingent, becomes, upon the death of the member, fixed and certain in the beneficiary, in accordance with the rule of law which favors vested estates rather than those which are contingent. Thus in a certificate issued to a member of a mutual benefit association, two beneficiaries were named, and "in case of death of either, full amount to go to the survivor, if living; if not living, to the heirs of said member." It was held that the gift to the beneficiaries became operative at the death of the member, and that if one died before the time provided for the payment of the amount, his share should go to his executor, and not to the survivor: *Union Mut. Aid Ass'n v. Montgomery*, Sup. Ct. Mich. 1888.

It was held in Missouri, that, at common law, the wife had such an interest in the life of her husband that a policy taken out by him for her benefit would be valid; and where the husband died during the life of his wife, the policy would be enforced. But the only ground upon which the policy could be sustained when issued was the fact that the wife had a right to look to her husband for support, and that object being lost by her death before the death of her husband, he would not be bound to continue the policy for the benefit of her legal representatives, and he might change it for the benefit of a subsequent wife: *Gambs v. Covenant Mutual Life Ins. Co.*, 50 Mo. 44. So in Wisconsin the rule is laid down that unless a policy of life insurance points out to whom the insurance money shall be paid, in case the beneficiary die before the insured, the appointment of the beneficiary is revoked by his death: *Foster v. Gile*, 50 Wis. 603; and this rule is not abrogated, where the beneficiary is the wife of the insured, by the provisions of the Wisconsin Revised Statutes, section 2347: *Given v. Wisconsin Odd Fellows' Mutual Life Ins. Co.*, 71 Wis. 547. And see, to the same effect, *Washington Ben. Endowment Ass'n v. Wood*, 4 Mackey, 19; 54 Am. Rep. 251.

LEWIS v. LONG.

[102 NORTH CAROLINA, 206.]

NEGOTIABLE INSTRUMENTS — EVIDENCE. — One of two joint promisors whose names appear on the face of a negotiable instrument may show by parol evidence that he signed only as surety, if the payee had notice that one was a surety. But if such payee indorses the instrument before maturity to one without notice, who in turn indorses it to still another, after maturity, who takes for value, and without notice, the fact that one of the promisors was a surety cannot be shown as against the last taker.

CIVIL action brought by R. J. Lewis upon a note, under seal, as follows:—

“\$100. On or before the first day of November, 1883, we, or either of us, promise to pay to J. M. Grizzard, or order, the sum of one hundred dollars, for value received. Witness our hands and seals this ninth day of June, 1883.

“AARON PRESCOTT. [Seal]

“W. W. LONG.” [Seal]

The note was indorsed by Grizzard, for value, to one Mrs. Cooper, who indorsed it for value, after maturity, to the plaintiff. The defendant Prescott was principal, and the defendant Long was surety on the note. This was known to Grizzard, the original payee, but was not known to the plaintiff, who bought the note for value, believing that both Prescott and Long were principals, and jointly responsible. It was adjudged that the plaintiff recover nothing of the defendant Long, and the former appealed.

E. T. Clark, and Batchelor and Devereux, for the plaintiff.

J. N. Mullen and W. E. Daniel, for the defendant.

SHEPHERD, J. Whether a joint promisor may show by parol that he signed only as surety has been the subject of conflicting decisions, both in England and America. That he can do so in this state, where the payee has notice, is well settled: *Capell v. Long*, 84 N. C. 17; *Goodman v. Litaker*, 84 Id. 8; 37 Am. Rep. 602; *Welfare v. Thompson*, 83 N. C. 276.

But such a defense cannot be made against a *bona fide* holder without notice: Randolph on Commercial Paper, sec. 907; Daniel on Negotiable Instruments, sec. 1338; 2 Edwards on Bills and Notes, 692; *Goodman v. Litaker*, *supra*.

The note sued upon was under seal, but was indorsed, and is “to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law appli-

cable to promissory notes, as if it were a promissory note not under seal": *Miller v. Tharel*, 75 N. C. 150; *Spence v. Tapscott*, 93 Id. 246.

It was indorsed to Mrs. Cooper, and the law presumes that she took "it for value, and before dishonor, in the regular course of business": *Tredwell v. Blount*, 86 N. C. 33.

Mrs. Cooper, being a *bona fide* holder, and having no notice, would have been unaffected by the defense relied upon in this action. Does the fact that the plaintiff purchased from her after maturity (but without notice) put him in a worse position than that occupied by his assignor? Very clearly it does not. Mr. Randolph, *supra*, section 987, says: "So a purchaser after maturity from a *bona fide* holder, who took the paper for value, before maturity, is entitled as a *bona fide* holder, before maturity, to the rights of his indorser."

To the same effect is Edwards, *supra*, vol. 2, 692, note; Daniel, *supra*, sec. 589.

The cases of *Harris v. Burwell*, 65 N. C. 586, and *Capell v. Long*, *supra*, cited by the defendants, do not conflict with this view. In the former case, the plaintiff purchased the note after maturity, and therefore took it subject to the defense of "set-off," which the maker had against his assignor at the time of the assignment. In Capell's case, the payee had notice, and assigned after maturity. In both of these cases it was held that the purchasers took subject to any defense which existed against their assignors. In our case, as we have seen, no defense existed against Mrs. Cooper, the plaintiff's assignor, and it is therefore clearly distinguishable.

Reversed.

NEGOTIABLE INSTRUMENTS—SURETY.—Where one has executed an instrument, apparently as principal, but in fact only as a surety, he is bound to the creditor as principal, unless such creditor knew the true character of the obligation: *Goodman v. Litaker*, 84 N. C. 8; 37 Am. Rep. 602; *McCloskey v. Indianapolis etc. Union*, 67 Ind. 86; 33 Am. Rep. 76; *Dane v. Corduan*, 24 Cal. 157; 85 Am. Dec. 53, and note.

NEGOTIABLE INSTRUMENTS—SURETY.—Parol evidence is admissible to show that one who is apparently a joint maker and principal upon a promissory note is really only a surety: *Harmon v. Hall*, 1 Wash. 422; 34 Am. Rep. 816; *Irvine v. Adams*, 48 Wis. 468; 33 Am. Rep. 817; note to *Lewis v. Harvey*, 59 Am. Dec. 292; *Burke v. Cruger*, 8 Tex. 66; 58 Am. Dec. 102; note to *Dane v. Corduan*, 85 Am. Dec. 58. In an action upon a written contract, it may be alleged and proven, when necessary, that one or more of the parties to the same signed the contract only as sureties: *Thompson v. Coffman*, 15 Or. 631. The addition of "security" or "surety" to the name of the signer of a bond is *prima facie* evidence of his suretyship; but it may be rebutted by parol evidence to the contrary: *Boulware v. Hartsook*, 83 Va. 679.

EMERY v. RALEIGH AND GASTON RAILROAD CO.

[102 NORTH CAROLINA, 209.]

PLEADING AND PRACTICE—SETTLING ISSUES.—ORDINARILY, IT MUST BE LEFT TO SOUND DISCRETION OF TRIAL JUDGE TO DETERMINE whether to submit specific issues, for the purpose of eliciting distinct findings in the nature of a special verdict, or to confine the inquiry, in imitation of the common-law practice, to a single issue, or a small number of issues, provided, always, that the issues submitted are raised by the pleadings.

PLEADING AND PRACTICE.—IT IS MISLEADING TO EMBODY IN ONE ISSUE TWO PROPOSITIONS, as to which the jury might give different responses, and on exception taken in apt time, a new trial will in such cases be granted. The facts found by a jury, whether comprehended under one or many issues, must be sufficient to enable the court to proceed to judgment.

PLEADING AND PRACTICE.—NEW TRIAL WILL NOT BE GRANTED when the judgment can be predicated upon the findings, although it appears that issues tendered by a party were refused by the trial judge, if the jury were told by the judge how the testimony relating to the rejected issues should be considered in connection with the law, in passing upon the issues submitted.

PLEADING AND PRACTICE.—NO LIMIT WILL BE IMPOSED TO EXERCISE OF DISCRETION ON PART OF TRIAL JUDGE IN SETTLING ISSUES, except that the facts established by the verdict shall constitute a lawful basis for the judgment, and that a party shall not be denied an opportunity to have the law applicable to any material portion of the testimony fairly presented to and passed upon by the jury, through the medium of some issue.

RAILROAD COMPANIES—NEGLIGENCE.—IT IS DUTY OF RAILROAD COMPANY TO SO CONSTRUCT ITS CULVERTS that they will carry off the water of the streams, over which they are constructed, under all ordinary circumstances likely to occur in the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, though of but occasional occurrence, but it is not bound to so construct them as to carry off overflows which result from extraordinary and unusual rainfalls.

RAILROAD COMPANIES.—EVIDENCE OF ONE'S REPUTATION AS AN INTELLIGENT AND EXPERT CIVIL ENGINEER, under whose supervision a railroad culvert was built, is incompetent and inadmissible on the trial of an issue as to whether the culvert was in fact so constructed as to carry off any but an excessive rainfall.

RAILROAD COMPANIES—EVIDENCE.—In an action against a railroad company to recover damages resulting from an insufficient culvert, a witness for the defendant, called as an expert, testified that he built the culvert, and that it was the largest one he ever built. In such case, the plaintiff was properly permitted to show that a culvert built by another corporation, a short distance below over the same stream, was larger than the culvert in controversy.

NEGLIGENCE—CONTRIBUTORY, OF LAND-OWNER.—One whose land is overflowed with water, and whose brick-yard and crops on the premises are submerged, by reason of the negligent construction of a railroad culvert, is not guilty of contributory negligence in afterwards planting crops on the same land, and erecting a brick-yard in the same place, both of which are again submerged from the same cause.

NEGLIGENCE. — WHEN THE FACTS ARE ASCERTAINED, QUESTION WHETHER THERE HAS BEEN NEGLIGENCE or contributory negligence, is one addressed to the court. When there is any conflict in the testimony, the courts will lay down the rules of law, and define the standard of care necessary, but will leave the jury to decide whether, under the circumstances, proper care was exercised.

RAILROAD COMPANIES — CONDEMNATION PROCEEDINGS AS ESTOPPEL. — Injury resulting from the unskillful construction of railroad culverts cannot be estimated as a part of the damage for the right of way of a railroad company, and proceedings for condemnation of the land, to which the land-owner and the company were parties, will not operate as an estoppel in an action by the former for injury to his lands caused by the unskillful construction of culverts by the latter.

EASEMENT BY PRESCRIPTION. — RIGHT BY PRESCRIPTION TO MAINTAIN CULVERT SO CONSTRUCTED AS TO CAUSE PLAINTIFF'S LAND TO BE OVERFLOWED may be acquired by a railroad company by user for twenty years. But the user must have been such as to have subjected the company to an action at any time during the twenty years, and the burden is on the company to show that at regular or irregular intervals during the twenty years, the water has overflowed the very land in controversy.

CIVIL action brought by T. L. Emery and wife against the Raleigh and Gaston Railroad Company, to recover damages for injury to the plaintiff's lands caused by reason of the negligent construction of a culvert over a stream on the defendant's line. Other facts appear in the opinion. There was a verdict and judgment for the plaintiff, and the defendant appealed.

R. O. Burton, for the plaintiff.

W. H. Day, for the defendant.

AVERY, J. The action was brought to recover damage for injury done to plaintiff's brick-yard in the year 1885, and again in May, 1887, and to his crops, by overflows caused by the defective construction of a culvert over a creek on the defendant's line.

The first and second exceptions present the question, whether his honor erred in refusing to submit two additional issues tendered by defendant's counsel. It was not the design, in adopting the new procedure, that parties should be bound by rules so technical as those which governed the old system of pleading. The forms of action being disregarded, and it being requisite only under the code to allege the material facts in the complaint, and to admit or deny the allegations in the answer, ordinarily it must be left to the sound discretion of the *nisi prius* judge to determine, when required or allowed to settle the issues, whether the action can be tried more intelli-

gently and satisfactorily by the jury upon specific issues submitted for the purpose of eliciting distinct findings in the nature of a special verdict, or by confining the inquiry, in imitation of the old method, to a single issue, or a small number of issues, and pointing out, by instruction, how the conflicting evidence, controverted in the pleadings and on trial, though not involved in the terms of the issues submitted, bears upon the verdict to be rendered in response to them, provided, always, that the issues submitted are raised by the pleadings.

It is misleading to embody in one issue two propositions, as to which the jury might give different responses, and on exception taken in apt time, a new trial will in such cases be granted. The facts found by a jury, whether comprehended under one or many issues, must be sufficient to enable the court to proceed to judgment. When the judgment can be predicated upon the findings, though it may appear that the judge who tried the case below refused to submit more specific issues tendered by a party, yet if he told the jury how the testimony relating to the issues refused should be considered in connection with the law, in passing upon those submitted, and thereby gave opportunity to enter exception to the instruction given, and to the refusal to give that asked, the appellate court will not grant a new trial. The court will impose no limit to the exercise of discretion on the part of the judge below in settling the issues, except that the facts established by the responses to them shall constitute a lawful basis for the judgment, and that an appellant was not denied an opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury through the medium of some issue.

The defendant contends that there was error in declining to submit to the jury the two issues offered: "1. What was the depth of rainfall on the 10th of May, 1887? Was the rainfall 10th of May excessive and extraordinary? 2. What damage did plaintiff sustain by ponding back of the water on that occasion?"

His honor presented the whole question of negligence on the part of the defendant in the first of the five issues, to which the jury responded, and which is in the following language: "Has the defendant negligently ponded water back upon the plaintiff's land?"

The judge instructed the jury upon the question of negli-

gence on defendant's part as follows: "It was the duty of defendant to have constructed its culvert so it would carry off the water of the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the right of grant, actual or presumed, to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances (and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional, and by reason of insufficient culvert the plaintiff's land was overflowed, the answer to the first issue should be 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land."

We think his honor stated the law correctly, and is sustained by the case of *Wright v. Wilmington*, 92 N. C. 156, and the authorities there cited; also 2 Wood on Railways, sec. 253, p. 873.

By applying the law, as stated by the court, the jury would naturally determine, from the testimony, whether the rainfall of the 10th of May, 1887, or that in the year 1885, was so extraordinary and excessive that it could not have been reasonably expected to fall; and if such was the character of the rain at either date, they would naturally leave out any injury sustained by such a rainfall in making their estimate of the damage; or if they found that all the damage sustained by the plaintiff, both in his brick-yard and as to his crops, was attributable to extraordinary rains, they would of course respond "No" to the issue. His honor, in addition to the language quoted from his charge, told the jury that the defendant was "not negligent, if the overflow was the result of extraordinary and unusual rainfall." The defendant introduced a witness, P. B. Hawkins, who testified that he built the culvert in 1859, was contractor for the work, and that one Bodwell, a civil engineer, had direction of the construction.

The defendant offered to show, by the witness Hawkins, "the reputation of Bodwell as an intelligent and expert engineer." On objection by the plaintiff, the testimony was held to be incompetent, and the defendant excepted. Counsel on the argument in this court did not abandon this exception, but failed to cite any authority in support of it; and we cannot see how the fact that the engineer, who had the oversight of the construction of the culvert, was an intelligent and ex-

pert engineer tends to show that the culvert was in fact so constructed as to carry off any but an excessive fall of rain.

The plaintiff had, before the introduction of the witness P. B. Hawkins, "offered to prove, as tending to show negligence, that some two hundred yards below, on the same stream, the Roanoke Navigation Company had constructed a culvert before defendant, which was twenty-six feet wide"; but upon objection by defendant, the testimony was then excluded. The witness Hawkins, having qualified himself to speak as an expert, said: "I think the culvert a sufficiently large culvert for the size of the stream. I thought it sufficient to carry off any rise. It was the largest culvert I ever built." Subsequently, the court, being of opinion that the defendant, by the examination of Hawkins, had "opened the door," and made the evidence previously excluded competent, allowed a witness to testify, after objection on the part of the defendant, that the culvert built by the Roanoke Navigation Company, two hundred yards below, on the same stream, was larger than that built by Hawkins, and this is the ground of another exception relied on by the defendant. We concur with his honor in his ruling. Hawkins had qualified as an expert, as we may fairly infer from the record, in part, at least, showing his experience as a contractor for work on railways, and at any rate he had been allowed, after stating that he had built that particular culvert, to testify further that it was the largest he had ever built, the natural inference being that he had constructed a number, and this was of unusual capacity. In order to break the force of this testimony, it was competent for the plaintiff to show that another had been built so near below that the volume of water in the stream would not probably be materially increased before reaching it, or certainly to show that another and larger one was very near, and in that way to meet the argument (which defendant's counsel might make to the jury) that an expert and experienced engineer had never constructed one that would allow so much water to pass. Hawkins might have been asked, on cross-examination, with a view to impeach him or destroy the weight of his testimony as an expert, what the dimensions of the lower culvert were: 1 Greenl. Ev., sec. 468. But we think that the testimony of Hawkins tended to show that the defendant had not done the work in a negligent or unskillful manner, by impressing the jury with the idea that no larger culvert had ever been constructed, because an educated and intelligent contractor

had not, in the years of experience that made him an expert, built one so large. This is only a fair inference from the testimony, and it would follow that testimony as to the location and capacity of the lower culvert must of necessity tend to remove the incorrect impression made by Hawkins's testimony, and in that way bear directly upon the question of negligence involved in the first issue.

The testimony offered to prove that the stagnant water engendered malaria, and caused sickness, was withdrawn from the jury, and the exception growing out of its introduction was not insisted on in this court.

Counsel for the defendant contends that there was error in the refusal to give the instruction prayed for in reference to contributory negligence, and in giving that substituted by his honor for it. Indeed, in the argument in this court, counsel went further, and cited a number of authorities to establish the position that this is a case in which, upon the undisputed facts, the jury should have been told there was contributory negligence on the part of the plaintiff.

The plaintiff, T. L. Emery, testified that in the fall of 1885 his brick-yard was overflowed, and in May, 1887, it was again submerged, and that the plaintiff suffered great damage on both occasions in the destruction of brick.

In reply to a question, he stated, as a reason why he again made brick at the same place after the overflow in 1885, that the preparation of the brick-yard had cost him a good deal of money, and that the place selected was the only place suitable for making brick on the land.

It is insisted that there was a want of ordinary care shown by plaintiff in manufacturing brick a second time in a place that had been overflowed nearly two years before.

If the jury had not found that there was negligence on the part of the defendant in response to the first issue, then, under the instruction of his honor, it would have been unnecessary to proceed to consider the third, which involved the question of contributory negligence. So we may assume that the jury agreed upon the affirmative answer to the first issue before discussing the third.

We cannot, upon reason or authority, reach the conclusion that the plaintiff exhibited a want of ordinary care by manufacturing brick in the year 1887 because the brick-yard had been damaged in 1885, nor that he was negligent in planting another crop in the latter year on land that

had been overflowed two years before, for the reason that the defendant company, by the careless and unskillful construction of its road, in the failure to provide adequately for the escape of the water of the creek, even when there was no extraordinary volume, had subjected the plaintiff to some risk in raising the usual crops on the farm, or attempting to utilize the only suitable place for manufacturing brick on that tract of land. It is often difficult to determine when the admitted evidence in a case crosses the shadowy line, and compels the court to take the case from the jury, and declare as the law that contributory negligence has been proven. The application of the rule, that when the facts are ascertained the question whether there has been negligence or contributory negligence is one addressed exclusively to the court, is attended with difficulty, because it seldom happens that the material facts in any two cases are precisely the same. When there is any conflict in the testimony, the courts will lay down the rules of law, and define the standard of care necessary, but leave the jury to decide, whether, under the circumstances, ordinary care was exercised by a defendant.

The defendant has no reason to complain that the court allowed the jury to apply, as the test, the abstract principle that the plaintiffs were bound to exercise that degree, and only that degree, of care which a man of ordinary prudence would exhibit in the management of his affairs, and refuse to sustain the unreasonable proposition that a prudent man must either allow his land to remain uncultivated, and his brick-yard, with his investment for manufacturing, to be abandoned, or incur the risk of losing the fruits of his labor, because he had some reason to fear that, by the negligent construction of a culvert, the crop or the brick might be injured or destroyed: Wood on Railway Law, sec. 300, and notes.

The authorities cited by defendant do not sustain the position either that the court erred in refusing to give the instruction asked, or in the failure to go further in that given, and tell the jury that the admitted facts were sufficient proof of contributory negligence. The authority to which counsel refers us is not applicable to the facts of this case: Beach on Contributory Negligence, secs. 12, 13.

The same author says (section 162): "It is for the court to say, in a majority of instances, what is and what is not negligence as an abstract proposition. When, therefore, the facts of a given case are undisputed, and the inferences or conclu-

sions to be drawn from the facts indisputable,—when the standard of duty is fixed and defined, so that a failure to attain it is negligence beyond a cavil,—then contributory negligence is matter of law. When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, it is the province of the court to determine the question of contributory negligence as one of law." He cites Field on Damages, 519, to the effect that, "to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy." The learned author concludes that, "in a majority of cases, the question of the plaintiff's negligence will be one of fact, to be ultimately determined by a jury."

In *Detroit R. R. Co. v. Von Steinborg* (cited by the author), Judge Cooley says: "The case must be a very clear one which would justify the court in taking upon itself this responsibility." Speaking of the finding by the court that there was contributory negligence in any given case, the learned judge says further: "He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care."

The last exception grows out of the refusal to give the instruction asked, that "if the defendant has used its culvert, as it now is, since 1859, then the law presumes it has a grant to do so, and the plaintiff cannot recover." The injury resulting from the unskillful construction of culverts cannot be estimated as a part of the damage for right of way, and the grant from the land-owner, or the proceeding for condemnation to which he and the corporation were parties, would not operate as an estoppel in an action brought by him for injury caused by the unskillful construction of culverts, and consequent damage to land located beyond the right of way. The owner of adjacent land can, of course, resort to common-law remedy for damage sustained by him in the overflow of his land, directly consequent upon such carelessness on the part of a railroad company in the construction: 2 Wood on Railway Law, sec. 258, p. 876. His recovery can be defeated only

by proof of a prescriptive right, acquired by user, to maintain the culvert in its present state, with the consequent injury. The right by prescription could be acquired by the defendant by user for twenty years, and the user, in order to raise the presumption of a grant from the quiet enjoyment of the easement, must have been such as to have subjected the claimant to an action any time for twenty years before his right to the easement was controverted by the bringing of this action. The defendant must show, too, in order to establish his right to the easement, "that the user, at the time when the action was brought, was not substantially in excess of that which he had exercised during the period requisite to the right": *Sherlock v. Railway Co.*, 115 Ind. 22. To apply that rule to this case, the burden is on the defendant to show, not that the overflow has constantly extended over a fixed territory on the plaintiff's land, or varied only with the water-mark for twenty years, but that at regular or irregular intervals the water has overflowed the very land on which the bricks were destroyed or the crops injured, and to the very same extent, so as to have made the defendant liable in an action for or in the nature of trespass by the *feme* plaintiff, and those under whom she claims, at any time during that period.

The floods occurring at intervals must have always covered the land on which the crops were raised, or the bricks were made, in order to establish an easement that would prove available as a defense to the one ground of action or the other: *Wood on Limitations of Actions*, sec. 182, p. 377; *Sherlock v. Railway Co.*, 115 Ind. 22.

The defendant has not attempted to establish the prescriptive right by offering any testimony to show that the land has been overflowed. So far as we can judge from the report of the evidence, which does not purport to be full, there was no proof offered as to the nature or extent of the overflow, except that offered by plaintiff in support of his demand for damage, and covering only three years prior to the bringing of the action. The proof by the plaintiff that ordinary rains, for four years prior to the bringing of the action, had been sufficient to cause the overflow of the brick-yard and the cultivated land of the *feme* plaintiff, does not supply the omission of the defendant company, or relieve it of the burden. It does not follow that the overflow has been uniform so as to subject the company to an action in favor of those under whom she claims, for the previous time, extending back twenty years; for changes

in the system of drainage by land-owners above, and the clearing of lands, might have increased the volume of water in the creek and caused it to overflow more readily. But such alterations would not have relieved the defendant company of liability resulting directly from the insufficiency of its culverts to discharge the water. No such testimony having been offered by the defendant, the complaint that his honor left the jury to pass upon the question whether an easement had been acquired ought not to come from it.

We conclude, therefore, that there was no error, and the judgment must be affirmed.

RAILWAYS. — A railway company is not liable to a land-owner for an injury by an overflow of surface water occasioned by the road-bed, skillfully constructed: *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271; 53 Am. Rep. 581. But the company is liable for negligence or a lack of skill in providing against such an overflow of water: *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382; 47 Am. Rep. 291, and note 296; *Johnson v. Atlantic R. R. Co.*, 35 N. H. 569; 69 Am. Dec. 560; *Pittsburg R. R. Co. v. Gilleland*, 56 Pa. St. 445; 94 Am. Dec. 98; *Jones v. Western Vermont R. R. Co.*, 27 Vt. 399; 65 Am. Dec. 206. Compare *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; *ante*, p. 58, and note; *Philadelphia etc. R. R. Co. v. Davis*, 68 Md. 281; 6 Am. St. Rep. 440.

RAILWAYS — DEFECTIVE ROAD-BED — EVIDENCE. — The court properly excluded evidence that the engineer, under whose supervision a road was constructed, was competent and skillful, especially where it appeared from other evidence that the road was properly constructed: *McPherson v. St. Louis etc. R'y Co.*, 97 Mo. 253.

NEGLECTANCE, WHEN A QUESTION FOR THE COURT, and when a question for the jury: *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; *ante*, p. 617, and note; *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; *ante*, p. 87, and note; *Village of J. v. Chapman*, 127 Ill. 438; *ante*, p. 136, and note; *East Line etc. R'y Co. v. Scott*, 71 Tex. 703; 10 Am. St. Rep. 804, and note; *Parsons v. New York etc. R. R. Co.*, 113 N. Y. 355; 10 Am. St. Rep. 450, and note.

RAILWAYS. — Damages are recoverable by a land-owner against a railway company for maintaining an insufficient culvert, whereby his land becomes flooded, although damages may have been recovered for the location of the road, because the damages then recovered were estimated on the supposition that the road would be constructed and operated in a reasonable and skillful manner: *Ohio etc. R'y Co. v. Wackter*, 123 Ill. 440; 5 Am. St. Rep. 532, and note 537-540.

PRACTICE — SETTLING THE ISSUES: Compare *Brown v. Mitchell*, 102 N. C. 347; *post*, p. 748.

FAULCON v. JOHNSTON.

[102 NORTH CAROLINA, 264.]

CROPS, TITLE TO, WHEN GROWN ON LANDS HELD ADVERSELY. — Crops raised on land by the labor of one in adverse possession under a claim of right, or his agents, belong to him, and are not the property of the rightful owner of the soil; and such owner of the soil cannot assert title to the crops so raised, and, by waiving the tort, pursue and recover the specific articles, or their money value, in the hands of a stranger who received them from the adverse claimant of the land, or his tenants, and converted them to his own use.

EVIDENCE. — **ADJUDICATION OF RECORD IS EVIDENCE** against all the world to establish the fact that such a judgment was rendered, and of all the legal consequences necessarily resulting from that fact.

EVIDENCE. — **PRINCIPLE WHICH REQUIRES PRODUCTION OF WRITING TO PROVE ITS CONTENTS**, and excludes parol proof thereof, has no application when the inquiry into its contents comes up collaterally at the trial, and the contents are not directly involved in the controversy.

EVIDENCE. — **FACT THAT ONE IN POSSESSION OF LAND LISTED IT IN HIS OWN NAME** for the purpose of taxation, though of slight, if of any, import as evidence of title, is receivable as showing a claim of ownership, for the reason that it is an act done in pursuance of the requirements of law.

EVIDENCE. — **IT IS NOT ADMISSIBLE FOR COUNSEL TO BE QUIET AND ALLOW EVIDENCE TO COME OUT, AND TAKE ADVANTAGE OF IT**, if favorable, and if not, to ask that it be stricken out, and not considered; and still less can he complain when it comes out in response to his own inquiries, and its withdrawal afterwards from the jury rests in the unreviewable discretion of the trial judge.

CIVIL action, in which the verdict and judgment were in favor of the defendant, and the plaintiffs appealed. The opinion states the case.

J. B. Batchelor and John Devereux, Jr., for the plaintiffs.

W. H. Day and R. O. Burton, Jr., for the defendant.

SMITH, C. J. This action, begun on December 29, 1886, in the superior court of Halifax, is prosecuted by the surviving devisee and administrators of two devisees, claiming under the will of Isaac N. Faulcon, to recover moneys received by the defendant during several years, as rent alleged to be due the plaintiffs for the use and occupation of the devised lands, paid by tenants thereon to him. The defendant, not denying his receiving said moneys, in answer to the charge of his being responsible to account with the plaintiff therefor, says that the said land, during this interval of time when rents were paid, was in the adverse possession of one James A. Faulcon, who, claiming to be the owner, leased parts of the premises to the

different occupying tenants, to whom the defendants furnished agricultural supplies in carrying on farm operations, and that rent notes taken by the lessor were handed over to defendant to secure the advances, which notes he collected, and so applied the proceeds.

He further says that the said James A. Faulcon remained in possession and control of the said lands till the 1st of September, 1885, undisturbed, when suit was instituted, by those deriving title under the will, to recover possession, which, at November term of the superior court following, terminated in a judgment in their favor, and under it possession was acquired.

The only issue extracted from the pleadings, and passed on by the jury, is in these words: "Did the defendants receive money or rents belonging to the plaintiffs? and if so, how much?" It was answered in the negative. Whereupon judgment was rendered for the defendant, and the plaintiff appealed.

The plaintiffs introduced two contracts of letting, made by the testator, Isaac N., on January 1, 1878, one to John Young, and the other to John Faulcon, of parts of the land in contest, for four years, each writing declaring it to be the same land the lessees had rented for the two preceding years, and both lessees testified to having cultivated the land during the time, and paid the rent, seventy dollars a year, to the defendant.

The lessee, John Young, having testified to his having paid the rents due from him to the defendant, was asked, on cross-examination, why he did so, and answered, because he was told by James Faulcon to pay the rent to defendant. Again, he was asked by defendant if James Faulcon claimed the land, and in reply witness said he did claim it. These inquiries and the responses were admitted, after objection of plaintiffs.

In our opinion, the testimony was competent as explanatory of his act in making that payment of the rent, and under a demand, as an assertion and exercise of a claim of ownership in James Faulcon recognized by the witness.

A similar inquiry made of the lessee John Faulcon met with a similar objection, and was disposed of by a similar ruling.

The defendant offered, in order to prove an adverse occupancy of the land by James A. Faulcon, the record of an action brought against him by Walter B. Faulcon, Alice B., and Thomas C. Williams, who, except said Alice B., whose

administrator is a party in her stead, prosecute the present suit to recover possession of the land in the alleged wrongful possession of said James A., and for damages for the detention, a judgment rendered by default, and also an award of a writ of possession at fall term, 1885, of Halifax superior court.

This documentary evidence, after objection to its admission made and overruled, was allowed to go to the jury.

The defense arises out of the want of any privity between the plaintiffs and defendant from which could be implied a promise to pay money had and received to the plaintiff's use, and the existence of adverse relations in respect to the property between the plaintiffs and the said James Faulcon, who assumed control over the rents and directed their payment to the defendant for agricultural advances to the tenants. To this evidence we can see no just grounds of objection. The record is competent proof of all such facts as result from its existence as such, and of the adversary relations of the parties to it.

"A deed," says Gaston, J. (and the remark is equally applicable to an adjudication of record), "is evidence against all the world to establish the fact that such a deed was executed [or of a judgment rendered], and of course of all the legal consequences necessarily resulting from that fact": *Claywell v. McGimpsey*, 4 Dev. 89.

So the production of the transcript shows that there was an action successfully prosecuted to recover possession from the said James Faulcon, who assumed to hold the same. Besides, it was under the authority and by direction of the latter that the defendant received the rent moneys.

The defendant, on his own behalf, delivered testimony to which numerous objections were made during the course of the examination:—

1. The witness was permitted, after objection, to say: "James Faulcon placed the notes in my hands for supplies; sometimes he gave me statement in writing; I either had notes or he gave me written statements authorizing me to collect of different tenants; James had the control; Walter and his sister (the devisees) lived six or seven miles from Warrenton; I frequently saw plaintiffs, and had business transactions with them; they never made any demand or claim; James Faulcon's wife lived a mile and a half from the part claimed by Walter."

A part of the objection now preferred has been already an-

answered, in upholding the competency of evidence to show under what circumstances the rent money went into the defendant's hands.

The further objection, that the writings referred to should have been produced, or their absence accounted for, before letting in parol proof of their contents, is removed by the rulings in *Pollock v. Wilcox*, 68 N. C. 46, *State v. Carter*, 72 Id. 99, *Carrington v. Allen*, 87 Id. 354, and *State v. Wilkerson*, 98 Id. 696, in which it is held that the principle that requires the production of a writing to prove its contents does not apply when the inquiry into its contents comes up collaterally at the trial, and are not directly involved in the controversy.

2. The next objection is to his testifying to the fact that James Faulcon listed the land for the purpose of taxation. The fact appearing previous to 1885, *ante litem motam*, though of slight, if of any, import as evidence of title, is, in our opinion, receivable as showing a claim of ownership, for the reason that it is an act done in pursuance of the requirements of law: *Austin v. King*, 97 N. C. 339.

3. Upon the cross-examination of defendant, this testimony was elicited: "I have seen the will of Isaac N.; James Faulcon denied the title of plaintiff; I knew that something had been given in the will to James; I knew that the crops from which I received the rents grew on this land he controlled; I had transactions with the tenants; I do not know that I ever saw him turn out a tenant and put another in; I knew that he took notes from them; we lived in the same neighborhood; I never heard him make any bargain to rent, that I remember; I have been through the land with him once."

The plaintiffs asked that so much of this evidence as indicated the control of James Faulcon over the land be withdrawn from the jury. This was denied, the court being of opinion that its value as evidence was for the jury, and was not rendered incompetent because drawn out on the cross-examination. Plaintiffs excepted.

The exception is not very plainly presented. The objectionable matter is stated to be elicited upon the cross-examination of the witness, the defendant himself, by interrogations put by the plaintiffs. The answer, thus voluntarily brought out by the plaintiffs, could not be a subject of exception from them, and its withdrawal afterwards from the jury rested in the sound discretion of the court, is a matter not reviewable in this court.

As is said in *McRae v. Malloy*, 93 N. C. 154, "it is not admissible for counsel to be quiet and allow the evidence to come out, and take advantage of it, if favorable, and if not, to ask that it be stricken out, and not considered." Still less can he complain when it comes out in response to his own inquiries: *State v. Efler*, 85 Id. 585.

4. On the redirect examination, the defendant's counsel put this interrogation to him: "You stated, in reply to the question by plaintiffs, that you had seen the will; did you make inquiry into the matter?" The witness was allowed, after objection, to say: "We could find no evidence of title in Isaac N. Faulcon."

The substance of the declaration was, that the witness did not discover any evidence of title in the testator, under whom the plaintiffs claim.

We can see no prejudicial effect in the answer, since, as between the plaintiffs and James Faulcon, the title of the former is adjudged in the possessory action; and it is, at most, but a negation of a successful search,—not disproof of title.

5. The defendant was then allowed to prove a sale of the land, as the property of Isaac N., by the marshal of the United States, under an execution against him, and the marshal's deed therefor to Faulcon Brown, and, from the latter, a reconveyance to the said Isaac N. This latter deed was admitted, to show the time of its registration, and was read to the jury.

This was objected to; but we are unable to see any sufficient reason for the objection, as the entire proceedings relate to the plaintiffs' ancestor, and precede his devise to them, his grandchildren.

There were many instructions, fourteen in number, asked for defendant, as follows:—

"1. Every possession of real property is presumed by law to be a title in fee-simple; and it being proved by both plaintiffs and defendant that Isaac N. Faulcon was in possession of the land at the time of his death, there is no evidence before the jury to show that Isaac N. Faulcon was not the owner of the land, and the jury must find that he was."

This was not given by the court, because the title to the land was not involved, and plaintiffs excepted.

"2. There being no evidence impeaching I. N. Faulcon's title, the land went by his will to his grandchildren, and the jury must so consider it in making up their verdict."

This was refused, because the jury were told the title to the land was not involved in the issue. This was not given, and plaintiffs excepted.

"3. If John Young entered upon the land under the contract between him and I. N. Faulcon, which was proved, and which was for lease of four years, and continued in possession after death of said Isaac N., then John Young was tenant of the plaintiffs, and they were his landlord, and that tenancy continued as long as the tenant (John Young) remained on the land, and he could not, in law, enter into a contract with James A. Faulcon which would make the possession adverse as to his landlord."

The court is of the opinion that this instruction was given in substance in the charge to the jury, as hereinafter stated. The plaintiffs except, because they allege that it was not given as asked.

"4. If the jury are satisfied that John Young made the contract with I. N. Faulcon, and continued on the land after his death, there is no evidence to show that there was any possession adverse to the plaintiffs."

The court refused to give this instruction, and plaintiffs excepted.

"5. If John Young made the contract with I. N. Faulcon, and entered into possession, and continued in possession after his death, then the plaintiffs are entitled to recover from the defendant all that he received from John Young on account of the rent of the land."

The court refused to give this instruction, and plaintiffs excepted.

"6. The same instructions were asked as to the part of the land rented and cultivated by John Faulcon, and were disposed of in the same way."

"7. If William Faulcon rented and entered upon the land as the tenant of Isaac N. Faulcon, and continued in possession after his death, then the relation of landlord and tenant was constituted between William Faulcon and the plaintiff, and continued as long as William Faulcon continued to occupy the land, and no arrangement between him and James A. Faulcon could change this relation."

The court is of the opinion that this instruction was given in substance. The plaintiffs are of the opinion that it was not, and therefore except.

"8. If this relation existed between William Faulcon and

plaintiffs, then the plaintiffs are entitled to recover of the defendant all that he received of William Faulcon on account of such tenancy."

The court is of the opinion that this instruction was refused in part, and given in part, in the charge, as stated below. The plaintiffs except, because, as they allege, the instruction was not given as requested.

"9. The same instructions were asked as to Matt. Faulcon, and were disposed of in the same way.

"10. If William Faulcon made the contract with Walter Falcon, for himself and his sisters, to lease the land for five years, and occupied it during all that time, as it was testified to that he did, and paid the rents to the defendant, then William Faulcon became the tenant of the plaintiffs, and they are entitled to recover of the defendant all that was received by him from William Faulcon on account of such contract of renting."

This instruction was refused in part, and, the court is of the opinion, given in part, in the instructions given below. Plaintiffs excepted.

"11. If the plaintiffs became the owners of the land under the devise in the will of the said Issac N. Faulcon, and then James A. Faulcon attempted to rent out the land, and to assign the rents to the defendant, Johnston, and Johnston then collected the rents under this assignment, Johnston, the defendant, thereby became a constructive trespasser, and the plaintiffs are entitled to recover from him damages for such unlawful entries, and the amount received by Johnston is the measure of such damages; or the jury may regard the amount thus received as the measure of such damages, and render a verdict for the amount, with interest."

This instruction was refused by the court, and the plaintiffs excepted.

"12. That the acts and conduct of Walter Faulcon are not in law an estoppel."

The opinion of the court is, that this is given in part, and refused in part, in the charge of the court as given hereinafter. The plaintiffs except on the ground that the instruction was not given as requested.

"13. That the jury cannot consider the deeds to Brown, and from Brown to Faulcon, as affecting the rights of plaintiffs to this land, or in any way affecting their right of recovery. It was admitted only for the purpose of the date of its registra-

tion, and for no other purpose, and the court is requested to instruct the jury that they can consider it for no other purpose."

The court thinks that this instruction was given in substance in the charge, as stated below. The plaintiffs except, on the ground that it was not given. These general instructions are asked, subject, of course, to proper instructions as to the statute of limitations.

"14. Two of intestates of plaintiffs being infants, and one becoming covert during infancy, the statute of limitations cannot apply as to these two, in any view of the case. If it applies at all to Walter B. Faulcon, the adult, it cannot apply to the three years next before the bringing of the action of ejectment; for these three years he can certainly recover."

The counsel for defendant conceded that the statute of limitations was not a bar to any of plaintiffs except W. B. Faulcon, and the court so told the jury.

And, therefore, the court charged the jury as follows:—

"The title to the land is not at issue in this action. As between James Faulcon and those claiming under him, the title is adjudged in the plaintiffs.

"It is an established rule that a tenant cannot deny the title of the landlord, and the relation of landlord and tenant being once established, the tenant cannot change this relation until he surrenders the possession of the land, which he received from his landlord, back to him, and no contract with another can change that relation so long as the tenant remains in possession. If the relation of landlord and tenant existed between Isaac N. Faulcon, John S. Young, John Faulcon, William Faulcon, and Matt. Faulcon, at the time of the death of Isaac N. Faulcon, and if Isaac N. Faulcon duly made and published his last will and testament, and if that will was duly executed, and if the will was in the words read in evidence, it conveyed to the plaintiffs Walter and his sisters, children of Jesse N. Faulcon, the interest of Isaac N. Faulcon, and the tenants of Isaac N. Faulcon became the tenants of the said Walter Faulcon and his sisters, and they would be entitled to receive the rents from the tenants, and if the defendant received the rents from the tenants of plaintiff, then he would be liable, unless exonerated from such liability by some other principle or rule of law."

Plaintiffs except to the foregoing charge of the court.

"But if the land was in the adverse possession of James A.

Faulcon, he being in the adverse possession of the land, claiming it as his own, and he — being in such adverse possession — caused the annual produce of the land, produced by annual planting and culture, to be taken from the land to the defendant, and the defendant took it in payment of debts due from James A. Falcon for supplies, or otherwise due, then the defendant would not be liable for the products of the land delivered in kind, or sold and the money paid to him."

To this part of the charge plaintiffs except.

"It then becomes material for you to determine the nature of the possession of James A. Falcon. If he was occupying the land, claiming it as his own, denying the rights of the plaintiffs, the plaintiffs cannot recover of the defendant, although the land did, in fact, belong to the plaintiffs."

To this instruction the plaintiffs except. And the plaintiffs further except to the three preceding paragraphs of the charge taken together.

"If James A. Falcon was not in adverse possession, but took possession of the land as the agent of the plaintiffs, and he misapplied the rents, and paid them to Johnston, and Johnston, knowing that James A. Falcon was using the rents of the plaintiffs' land by delivering the notes as collateral security for supplies, then he would be liable for the amount received, if he knew of the relation, unless something more is shown. And if the plaintiff Walter Falcon knew that James A. Falcon was disposing of the rents, claiming to act as agent of plaintiffs, and he allowed this to go on with his knowledge, and acquiesced, or by his conduct led the defendant to reasonably believe he acquiesced in such disposition, then he would not be entitled to recover for such rents so disposed of to the defendant; but as to the other plaintiffs, they, being under disability, would not be estopped."

Plaintiff Walter Falcon excepts to this charge in his own behalf. Other plaintiffs also except thereto.

"Now, in regard to the statute of limitations: The cause of action, if there is any cause of action, accrued at the time the rent was received wrongfully by defendant; a right of action accrued, if any cause of action accrued, at the annual receipts of the rents. The plaintiff Walter Falcon cannot, under the evidence, recover, in his own right, anything for his part of rent for any more than three years before the beginning of this suit. The statute of limitations does not bar the other plaintiffs."

To this charge the plaintiffs, except Walter Faulcon in his own right, except.

The court gave to the jury, orally, careful instructions as to the issues and the evidence bearing upon them, and told the jury if the first issue should be found for the defendant, the other issues became immaterial. No exception was made to any except such as were in writing.

After the verdict, the plaintiffs moved for a new trial. Motion overruled. Judgment for defendant, and plaintiffs appealed to the supreme court.

Without revising and comparing the directions asked by appellants to be given to the jury and those given by the court, in order to ascertain if there are any such omissions or variations as might furnish some grounds for complaint, we are content with the single remark, that if correct in themselves, the charge seems to cover the whole matter in dispute, and leaves little cause for the appeal.

The solution of the controverted question of their right to recover the rents received by the defendant, under the circumstances, rests upon the correctness of the concluding paragraphs of the charge preceding what is said in relation to the statute of limitations, to wit, that if James A. Faulcon was in the occupancy of the land, claiming it as his own, and denying the rights of the plaintiffs, although the land was, in law, their property, they cannot recover the rents sued for, as moneys received to their use, in this action.

The question is this: Can the owner of the land in the adverse possession of another assert title to the crops grown thereon during such occupancy, and in its assertion, by waiving the tort, pursue and recover the specific articles thus raised, or their money value, in the hands of a stranger who may have received and converted them to his own use, or the rent money paid him by the tenants?

The cases cited in the argument conclusively establish the proposition that the crops, the product of the labor of the trespassing possessor and his agents, belong to him, and are not the property of the owner of the soil.

In *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400, the defendant, lessor of the plaintiff in ejectment, recovered of the plaintiff the land upon which were gathered the growing crops, the product of the year's cultivation, and being put in possession by the sheriff, took control of the crops, and applied them to his own use. The action was in trover to recover their value.

Delivering the opinion, Pearson, J., says: "The corn, etc., which was attached to the land at the time the defendant was put in possession, passed with it, and belonged to him. But the fodder, etc., which had been severed, although on the premises, did not pass with the land, for it had ceased to be a part thereof, and the defendant had no right to take it. His remedy was an action, not for the specific articles, but for damages by way of mesne profits. If the defendant had a right to take the specific articles, he would, for the same reason, be entitled to recover their value, in trover, against the plaintiff, or any one to whom he might have sold them." The same reasoning was applied to turpentine run into boxes cut in the body of the tree, the product of labor, in *Branch v. Morrison*, 5 Jones, 16, and when the case was again before the court, reported in 6 Id. 16.

A similar ruling, and in affirmation of that in *Brothers v. Hurdle*, *supra*, was made in the later case of *Ray v. Gardner*, 82 N. C. 454. If, then, James Faulcon was in the hostile occupation of the land when the crops were made by the several tenants, the crops did not in law belong to the plaintiffs; and the defendant, in taking and converting them to his own use, did not become liable to the plaintiffs, because they were not the property of the plaintiffs.

The principle that the owner of goods wrongfully seized and sold may waive the tort and ratify the sale, and recover the proceeds from the purchaser, has no application to the present case.

The jury having, by their verdict, established these adverse relations, and there being no error in the instructions leading thereto, the judgment must be and is affirmed.

CROPS—TITLE TO, IN WHOM.—If a party in possession of land claiming adversely to all others sells hay out therefrom during such occupancy to a third party, the legal title thereto passes to his vendee as against a party having a title in fee-simple to said premises, but who is not in possession: *Stockwell v. Phelps*, 34 N. Y. 363; 90 Am. Dec. 710. A fraudulent grantee of a farm has, as against the creditors of his grantor, title to the crops that he raises on the farm while the conveyance is unimpeached: *Hartman v. Wieland*, 36 Minn. 223. When a judgment debtor, whose lands have been sold under execution, seeks to redeem from the purchaser, under the provisions of section 1879 of the code, he is not entitled to the outstanding crops on the land, as against a tenant by the year of the purchaser at the execution sale: *Gardner v. Lanford*, 86 Ala. 508.

EVIDENCE—RECORDS.—Record imparts absolute verity in all judicial proceedings of a court of record of competent jurisdiction: *Merritt v. Horne*, 5

Ohio St. 307; 67 Am. Dec. 298. But a record has been held not to be evidence of the facts therein recited except between the parties and their privies: *Wilson v. Campbell*, 33 Ala. 249; 70 Am. Dec. 586. Records of a court cannot be impeached upon matters within its jurisdiction, when offered in evidence by counter-evidence: *Galloway v. McKeithen*, 5 Ired. 12; 42 Am. Dec. 153; and so the truth of facts certified in a record cannot be collaterally impeached by evidence *aliunde*: *Jones v. Jenkins*, 4 Dev. & B. 454; 34 Am. Dec. 392.

BROWN v. MITCHELL.

[102 NORTH CAROLINA, 247.]

NEW TRIAL — GRANTING NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE is a matter purely discretionary, whether the motion is addressed to the court below or is made in the appellate court. The general rule is, that when the new testimony tends merely to contradict a witness on the opposite side, a new trial will not be granted.

PRACTICE — ISSUES — EXERCISE OF DISCRETION ON PART OF TRIAL JUDGE IN SETTLING ISSUES is without limit, except that the facts found by the jury shall sustain the judgment, and a party must not be denied the opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury, through the medium of some one of the issues submitted.

FRAUDULENT CONVEYANCES, AS REGARDS BURDEN OF PROOF, ARE CLASSIFIED AS FOLLOWS: 1. When fraud appears so clearly upon the face of the deed as to be incapable of explanation *de hors*, there is a conclusive presumption of fraud. 2. When the law raises a presumption of fraud because of the relation of the parties to a transaction, or the circumstances attending it, and if rebutting evidence is offered, the issue must be left to the jury. 3. As a general rule, where there is only evidence of such circumstances as naturally excite suspicion as to the *bona fides* of a transaction, the issue involving the question as to its fraudulent character should be left to the jury, with instructions that such circumstances are badges of fraud, and should be scrutinized closely in passing upon the issue.

HUSBAND AND WIFE — VALIDITY OF TRANSFER OF PROPERTY BETWEEN. — If property be transferred by a husband to his wife, in payment of his indebtedness to her, the burden rests upon the wife to show, by a preponderance of evidence, that her husband was in fact indebted to her, but having established that fact, the question of fraud in the transfer is an open one for the jury to determine, under a caution from the court that they should scrutinize the transaction closely, because of the relation of the parties. In such case, though the husband intended to defraud his creditors, the validity of the transfer to the wife would not be destroyed, unless she participated in the intent or had knowledge thereof.

HUSBAND AND WIFE — CONSTRUCTIVE DELIVERY OF CHATTELS. — Where a husband executes and delivers a bill of sale of chattels to his wife, without an actual delivery of the chattels, and tells her that the property is hers, and she accepts the bill of sale and gives her husband authority to hold the property as her agent, and he uses the property as hers, and for

the benefit of the family, according to her directions, this will in law constitute a constructive delivery of the property, and a good title thereto vests in the wife.

HUSBAND AND WIFE — CONVEYANCE FROM HUSBAND TO WIFE. — Where a wife handed the proceeds of the sale of her land and timber to her husband as a loan, which he orally promised to repay, and ten years afterwards he executed to her a bill of sale conveying chattels equal in value to the amount of the loan, with interest, it was held that the husband's oral promise to repay the loan was valid, and that his conveyance of the chattels directly to his wife was not voluntary.

PLEADING AND PRACTICE. — UNDER CODE SYSTEM OF PLEADING, COURTS HAVE POWER TO ALLOW AMENDMENTS both before and after judgment. The only limitation on the power is, that no vested right shall be disturbed, and that the cause of action or defense shall not be substantially changed.

CIVIL action, brought in the name of the state upon the relation of Frank Brown and his wife, Elizabeth, against J. S. Mitchell, sheriff of Hertford County, and the sureties upon his official bond. The plaintiff sought to recover damages, alleging that the defendant, having an execution in the case of *Wynne v. Brown* (plaintiff in this action), wrongfully took possession of certain goods and chattels of Elizabeth Brown (*feme* plaintiff in this action), and converted the same to his own use. The defendant denied the alleged conversion, and for further defense alleged that the sale of the said property by Frank Brown to his wife, Elizabeth, was fraudulent and void, and made to defraud creditors, especially the plaintiff in said execution, and that said Elizabeth accepted the sale with notice of the fraudulent intent. Certain issues were presented by the defendants which the presiding judge declined to submit, and substituted others therefor, to all of which the defendants excepted. The plaintiffs offered in evidence a bill of sale from Frank Brown to Elizabeth Brown, his wife, which purported to convey the property in dispute. The alleged consideration of the conveyance was an indebtedness from Brown to his said wife, for money of her own which she loaned him ten years before, and which he orally promised to repay to her. There was no actual delivery of the possession of the property, and Brown continued to use it as his own, and to give it in as his own on the tax-lists. The conveyance was proved for registration at a late hour of the night, under unusual circumstances, and about the time that suit was brought against Brown by a creditor whose claim antedated the conveyance, which creditor was ignorant of the transfer of the chattels made by Brown to his wife. There was a verdict for

the plaintiffs, after which they moved to amend by striking from the summons and complaint the words "state on relation of," and to enter a *nolle prosequi* as to all the defendants except Mitchell, and the motion was allowed. Judgment was entered for the plaintiffs, and the defendant appealed. The defendant moved for a new trial in the supreme court, on the ground of newly discovered evidence.

W. D. Pruden, J. B. Batchelor, and John Devereux, Jr., for the plaintiffs.

B. B. Winborne, for the defendant.

EVERY, J. When a party to an action moves in the superior court, before the end of the trial term, for a new trial, on account of testimony discovered after the rendition of verdict, the motion is addressed to the sound discretion of the presiding judge, and if he rests his refusal to grant it solely upon his discretionary power, his decision is not reviewable in the appellate court: *Carson v. Dellinger*, 90 N. C. 226. So where a party moves for a new trial in the supreme court, on the ground that he has discovered, since the expiration of the trial term below, new and material evidence, that he could have the benefit of on a future trial, the higher court exercises a purely discretionary power in passing upon the motion. We therefore deem it proper to give notice that this court will, as a rule, in future, grant or refuse such motions without discussing the facts embodied in the petitions or affidavits of the moving party, as we cannot see that any good will be accomplished by contributing another to the volumes that have been written upon the exercise of legal discretion in deciding questions raised by applications for new trials. In this case, however, we find that the new testimony which the defendant proposes to offer is intended only to contradict the *feme* plaintiff as to her alleged declarations to the witness. The testimony in chief is not separated in the statement from that elicited by cross-examination; but it may be, and indeed it seems probable, that her testimony on that point was given in response to a question from defendant. We can readily see how, if the motion were granted, and acted upon as a precedent, a majority of defendants in cases like this might lay the foundation for a new trial, by asking one charged with being a party to a secret fraudulent conveyance, to whom the witness communicated the fact that it was executed, and then proposing by some of the persons named in reply to contradict

on a future trial. The proposed new testimony, as to the collection of fees for the services of the horse, would be offered confessedly to contradict statements made by the husband on cross-examination. The general rule is, that when the new testimony will tend merely to contradict a witness examined on the trial, a new trial will not be granted the party wishing the benefit of it: Hilliard on New Trials, c. 15, sec. 19; Graham and Waterman on New Trials, 498.

The defendant excepted to the refusal of the court below to submit the more numerous and specific issues tendered on his part, and the substitution of those passed upon by the jury instead of them.

The judgment can be predicated upon the facts found by the jury, as set forth in the record. It does not appear that the defendant was denied the opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury through the medium of some one of the issues submitted: *Emery v. Railroad Co.*, 102 N. C. 209; *ante*, p. 727. The exception cannot therefore be sustained.

The defendants insist that there was error in the refusal to give the instructions asked, numbered 6, 7, and 15, involving the question whether, upon the evidence, the court should have told the jury that there was a presumption, not only that the wife had not paid *bona fide* for the property assigned to her by her husband, but that a transaction of the kind between husband and wife cast upon the plaintiff the burden of rebutting the presumption that it was fraudulent.

The doctrine of the burden of proof, in its application to causes involving an issue of fraud, has led to their division into three classes (*Hardy v. Simpson*, 13 Ired. 132): 1. When fraud appears so expressly and plainly upon the face of the deed as to be incapable of explanation by evidence *de hors* (as when it is manifest, from reading a conveyance, that it was made and was intended to secure the ease and comfort of a debtor embarrassed with debt at the time of its execution), there is conclusive presumption of fraud, and the court, without the intervention of a jury, declares the deed fraudulent. 2. When the law raises a presumption of fraud because of the relation of the parties to a transaction, or the circumstances attending it, and if rebutting evidence is offered, the issue must be left to the jury. But in the absence of such testimony, the court acts upon the presumption, as when a person stands in certain fiduciary relations to others, such as arise

out of reposing trust in his skill and integrity. The law raises a presumption in any transaction between the parties that the party in the superior position has used it to the injury of the person in the inferior position: Bigelow on Fraud, 190; *Lee v. Pearce*, 68 N. C. 76; *McLeod v. Bullard*, 84 Id. 515; Kerr on Fraud and Mistake, 385, 386. Among the other cases classified under this head are those in which a conveyance seems (nothing more appearing) to have been made for the ease and comfort of the debtor, but in which it is evident that some explanation might be given, and a different purpose and intent might be shown: *Hardy v. Simpson*, 13 Ired. 132. 3. As a general rule, where there is only evidence of such circumstances as naturally excite suspicion as to the *bona fides* of a transaction, the issue involving the question as to its fraudulent character should be left to the jury, with instructions that such circumstances are badges of fraud, and should be scrutinized closely in passing upon the issue. Among these badges, as enumerated by the courts, are, failure to register a conveyance, required by law to be registered, within a reasonable time after its execution; the embarrassment of a grantor, and his failure to reserve sufficient property to satisfy his indebtedness; inadequacy of price; unusual credit given by one in failing circumstances; secrecy in the execution of a conveyance; the fact that one involved in debt makes a conveyance to a near relation: Bump on Fraudulent Conveyances, c. 4, p. 158. The last proposition embodies the usual, but not the universal, rule, however.

When a voluntary conveyance is attacked for fraud by the creditors of a donor, the burden is always upon the donor to establish the truth of circumstances that will repel the presumption of fraudulent intent, or by showing that the grantor retained other property sufficient to discharge all of his pecuniary obligations: Bump on Fraudulent Conveyances, 286.

The possession of the wife is also *prima facie* the possession of the husband, and consequently raises a presumption of ownership in him, and where the wife purchases property during coverture, whether from the husband or another, the burden is upon her to show distinctly that she paid the purchase-money out of her own separate estate, not with the funds furnished by her husband: Bump on Fraudulent Conveyances, 318. But this court has held that certain combinations of the several badges of fraud already mentioned will raise a presumption of fraudulent intent, and make it incumbent on the

party benefited by the alleged fraud to show the *bona fides* of the transaction. Counsel for the defendant cited especially the cases of *Reiger v. Davis*, 67 N. C. 185, *Tredwell v. Graham*, 88 Id. 208, and *McCanless v. Flinchum*, 98 Id. 358, in support of his position, and we propose, at a later stage of this discussion, to distinguish each of said cases from that at bar.

In applying some of the principles announced, we find that his honor instructed the jury as to the delivery: "Now, if the testimony satisfies you that Mrs. Brown accepted the bill of sale, and gave her husband authority to hold the property as her agent, they living together, and he using the property as hers and for the benefit of the family, according to her directions, this would be a constructive delivery."

This instruction was given just after calling attention to the testimony of the plaintiff and her husband, and plainly left the recovery of the plaintiff to depend upon the question, whether their evidence should show to the satisfaction of the jury that there was a constructive delivery. The *onus* was thus plainly thrown upon plaintiff to prove the delivery. The instruction was correct, too, as to what constituted a constructive delivery: Benjamin on Sales, secs. 1018, and notes, 1043, 1044; *Jenkins v. Jarrett*, 70 N. C. 255; *Bartlett v. Blake*, 37 Me. 124. The judge also left to the jury the question whether the testimony of the husband and wife combined (there being no other evidence as to the point) had satisfied them that there was a *bona fide* debt due from the former to the latter, and made the right of recovery dependent upon the weight given to their testimony as to the existence of the debt: 58 Am. Dec. 775. On this point he charged as follows: "Was there an indebtedness by the husband to the wife? You have heard the testimony of both husband and wife on this point. If they have satisfied you, by a preponderance of evidence, that there was an actual debt owing by the husband to the wife, he had a right to pay or secure the debt," etc.

He did not tell the jury that the law presumed that the deed was executed in good faith and for a fair consideration, but imposed the burden upon the plaintiff of showing a delivery, and also of establishing the consideration. The judge was not bound to adopt the language of the defendant's counsel.

He went far enough when he required the jury, as a condition precedent to find for the plaintiff, to be satisfied of the truth of the fact mentioned by him, when those facts, if true,

would rebut the presumption, arising out of the relation of husband and wife, that he was in possession in his own right, and that she had not paid for the property with her own funds. Indeed, it has been held by eminent authority incorrect to use the phrase "burden of proof" in such connection as suggested in the prayer for instructions. The burden of proof, it is said, never shifts, but is always on the party having the affirmative of the issue. The weight of evidence does sometimes shift in the progress of a trial: Greenl. Ev. 74, and note; 2 Am. & Eng. Ency. of Law, 655. This case cannot be made to depend on any construction given to the language used in *Reiger v. Davis*, 67 N. C. 185, nor upon the more decided terms used in *Tredwell v. Graham*, 88 Id. 208. It differs from both in the facts that a stranger, who was present and wrote the bill of sale, was examined in the trial, as well as the husband and wife, and there was an opportunity given to the jury to weigh the testimony of all as to the good faith of the transaction in question. It differs from both of those cases, and also from *McCanless v. Flinchum*, 98 Id. 358, in another respect. The husband and wife both testified that he had owed her a certain sum of money, and had paid a portion, leaving still due a balance sufficient to pay, and that was used to pay an adequate price for the property described in the bill of sale. While the testimony as to the existence of the debt does not seem to be controverted by any other testimony, still the *onus* was put upon the plaintiff by a preponderance of testimony.

In *Hodges v. Lassiter*, 96 N. C. 351, Chief Justice Smith, for the court, says: "But assuming proof, not controverted, to have been given of the indebtedness, the burden then rests on the plaintiffs, who allege, to prove fraud."

If it were not true, as it is, that our case is distinguishable from *Reiger v. Davis*, *supra*, we will find by referring to the language used by Justice Boyden (not to the *syllabus*) that the court intended to state the rule of evidence laid down by Best in his work on the principles of evidence, page 277: "Where effective proofs are in the power of a party, who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him." When the proofs are produced, the presumption is gone. The court said in *Reiger v. Davis*, *supra*: "It is a rule of law to be laid down by the court, that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret, and no one is present to witness the trade but these

near relatives, it is to be regarded as fraudulent, but when these relatives are made witnesses in the cause, and depose to the fairness and *bona fides* of the transaction, and that there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent or otherwise, as the evidence may satisfy them." The relatives and a stranger were introduced, and an attorney named, with whom plaintiff had consulted. The court evidently meant that the question whether the fraud was shown by the defendant to the satisfaction of the jury would, in our case, be left to the jury. Having pointed out the distinction between our case and that of *Tredwell v. Graham*, *supra*, it therefore is not necessary to question the proposition that the burden of proof shifted in that case.

Abbott, in his work on trial evidence, pages 171 and 172, says: "It is held that if the wife shows title to separate property or capital not derived from him, the fact that she employs him upon it, and supports him, does not raise a presumption of fraud. But his conduct in the business may be given in evidence on the question of fraud." The conduct of the husband in managing her horses and other property was given in evidence.

It is not material whether the husband gave her any written evidence of an indebtedness, and how he invested or reinvested the money, if he owed her an honest debt, and agreed to pay it: *George v. High*, 85 N. C. 99; *Dula v. Young*, 70 Id. 450. We conclude, therefore, that the learned judge who tried the case correctly interpreted the law, when, after declaring the *onus* upon the plaintiff to establish the debt and prove the delivery of the property, he left the jury to determine what weight they would attach to the circumstances in the evidence that amounted to badges of fraud, and mentioning each circumstance, especially cautioned the jury, because of the character of the evidence, to scrutinize the matter closely, and if they found that the husband executed the bill of sale with intent to hinder, delay, or defraud his creditors, and that the wife participated in that intent, they would return a verdict for defendant on the first issue: *Bump on Fraudulent Conveyances*, c. 4; *Johnson v. McGuire*, 11 Iowa, 151. After establishing the debt, it was proper to tell the jury that, though the husband intended to defraud his creditors, the validity of the transfer to the wife would not be destroyed unless she participated in the intent: *Battle v. Mays*, 102 N. C. 403. It was

competent for plaintiff to show the advice of her attorney as evidence of her good faith: *Bump on Fraudulent Conveyances*, 553.

There was no testimony tending to show that the bill of sale was intended as a security. On the contrary, the witnesses testified that it was a sale. We cannot see how the principle stated in *Dukes v. Jones*, 6 Jones, 14, applies to the facts of this case. The judge was not bound to leave the question whether the bill of sale was intended as a chattel mortgage to the jury merely because the plaintiff did not show affirmatively that she gave her husband a written receipt for the debt.

The defendant objected to the order of the judge allowing the pleadings to be amended to conform to the proofs after verdict. Superior courts possess an inherent power to amend pleadings, and, under the provisions of the code, have power to allow amendments both before and after judgment. The only limitation on the power is, that no vested right shall be disturbed, and that the cause of action or defense shall not be substantially changed: *Knott v. Taylor*, 96 N. C. 553; *Gilchrist v. Kitchen*, 86 Id. 20; *March v. Verble*, 79 Id. 19. If the action in this case had been originally begun and prosecuted against the sheriff individually, and not against him and his sureties on his official bond, it is obvious that the defense would have been the same made in this case, and the same issues would have arisen. The nature of the action has not been so changed as to surprise the defendant by making it necessary to establish any fact not already material under the issues submitted to the jury. The judge could, in his discretion, refuse the motion to amend or grant it, with or without terms: Code, secs. 272, 273; *Carpenter v. Huffstaller*, 87 N. C. 273; *Reynolds v. Smathers*, 87 Id. 24.

We conclude, therefore, that the defendant has shown no error that entitles him to a new trial. The judgment must be affirmed.

SMITH, C. J., dissenting, was of opinion that the facts developed at the trial "raised a presumption of fraud between parties, husband and wife, thus dealing with each, which the appellant was entitled to have given as an instruction to the jury, requiring proof in rebuttal. If the agreement for the continued use of the property, after as before the making of the deed, had been part of the arrangement for the transfer, it would have rendered the deed *ipso facto* void, as securing an interest to the vendor: *Rea v. Alexander*, 5 Ired. 644. The assent to such possession and use may authorize the inference of its being a prior condition, express or implied, which would avoid the deed,

and certainly strengthens the presumption of this vitiating element in the transaction. In *Astew v. Reynolds*, 1 Dev. & B. 367, the following language is used by Gaston, J., quoted with approbation by Ruffin, C. J., in *Foster v. Woodfin*, 11 Ired. 339, in reference to a conveyance unattended with a change of possession: 'But such a repugnance between the transfer and the possession yet raises the presumption of a secret trust for the benefit of the grantor, which, while it admits, also requires, an explanation, and which, unexplained or not satisfactorily explained, establishes the fraud.' Here there is none, — the consent to the use, for his own benefit, of the vendee, his wife. The refusal to so charge is an error, entitling the appellant to a *verdict de novo*."

NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — Applications for new trials are addressed to the sound discretion of the court: *Myers v. Brownell*, 2 Aiken, 407; 16 Am. Dec. 729. Newly discovered evidence, the sole object of which is to impeach the character of a witness, is rarely, if ever, a ground for a new trial: *McIntire v. Young*, 6 Blackf. 496; 39 Am. Dec. 443; *State v. Carr*, 21 N. H. 166; 53 Am. Dec. 179. Granting a new trial for newly discovered evidence rests in the sound discretion of the judge trying the cause: *Merchants' etc. Ins. Co. v. Curran*, 45 Mo. 142; 100 Am. Dec. 361. To entitle a party to a new trial on the ground of newly discovered evidence, it must be shown that such evidence could not, by due diligence, have been produced at the first trial: *Ward v. Voris*, 117 Ind. 368; *People v. Gun*, 77 Cal. 636; and such newly discovered evidence must be more than merely cumulative: *Burns v. People*, 126 Ill. 282; and it must be more than both cumulative and impeaching: *Donnelly v. Burkett*, 75 Iowa, 613. A new trial on the ground of newly discovered evidence will not be granted because, by reason of a mistake of law, such testimony was not produced at the trial: *Bagnall v. Roach*, 76 Cal. 106.

PRACTICE AS TO ISSUES. — The settling of the issues is left with the sound discretion of the trial judge: *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; *note*, p. 727.

FRAUDULENT CONVEYANCES — EVIDENCE — Question for Whom. — Fraud is ordinarily a question of fact for the jury: *Weaver v. Lapsley*, 42 Ala. 601; 94 Am. Dec. 671; *Drinkard v. Ingram*, 21 Tex. 650; 73 Am. Dec. 250; *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282; *Kuykendall v. McDonald*, 15 Mo. 416; 57 Am. Dec. 212; *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 108; *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319; *Anderson v. Burnett*, 5 How. (Miss.) 165; 35 Am. Dec. 425; *McMichael v. McDermott*, 17 Pa. St. 353; 55 Am. Dec. 560; *Filley v. Register*, 4 Minn. 391; 77 Am. Dec. 522; *Garland v. Chambers*, 11 Smedes & M. 337; 49 Am. Dec. 63; *Forryth v. Matthews*, 14 Pa. St. 100; 53 Am. Dec. 522; *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552. Under the Michigan statute, fraud in the purchase of goods afterwards attached at the suit of creditors of the vendor is a question of fact for the jury, not of law for the court, except in a few cases where a transaction is intrinsically incapable of a legal and honest effect: *Bedford v. Penney*, 65 Mich. 667. Whether a representation as to the value of property is merely an opinion or the affirmation of a fact, is a question of fact for the jury: *Senior v. Canaday*, 53 N. Y. 296; 13 Am. Rep. 523. Fraud is a question of fact for the jury, and cannot be presumed or inferred as a matter of law: *Phelps v. Smith*, 116 Ind. 387. The question of fraudulent intent is in all cases a question of fact which cannot be presumed, but must be proved to the satisfaction of the jury and by them so found: *Neisler v. Harris*, 115 Id.

560. Where the fraudulent intent is apparent in the conveyance itself, the question is one of law for the court; but where it is to be deduced from the surroundings and circumstances of the transaction, it is for the jury to ascertain upon a proper issue submitted to them by the court: *Beaseley v. Bray*, 98 N. C. 266. And so when the facts are ascertained, and there is no dispute as to what they are, fraud is a question of law for the court: *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57; *Dodd v. McCraw*, 8 Ark. 83; 46 Am. Dec. 301; *Jessup v. Johnson*, 3 Jones, 335; 67 Am. Dec. 243.

Burden of Proof in Fraudulent Conveyances. — The burden of proving fraud is, as a general rule, upon him who alleges it: *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621; *Stewart v. Severance*, 43 Mo. 322; 97 Am. Dec. 392; note to *Burch v. Smith*, 65 Id. 159; *Johnson v. McGrew*, 11 Iowa, 151; 77 Am. Dec. 137; *Hempstead v. Johnson*, 18 Ark. 123; 65 Am. Dec. 458; *White v. Trotter*, 14 Smedes & M. 30; 53 Am. Dec. 112; *Sattershite v. Hicks*, Bush. 105; 57 Am. Dec. 577; *Matthews v. Crockett*, 82 Va. 394; *Saunders v. Lee*, 101 N. C. 3; *Jones v. Degge*, 84 Va. 685; *Wallace v. Matice*, 118 Ind. 59; *Crawford v. Spencer*, 92 Mo. 498; *Bostwick v. Benjamin*, 63 Mich. 289; *Hickman v. Trout*, 83 Va. 478; *Heaton v. Shanklin*, 115 Ind. 595. Where a decree is attacked by creditors as fraudulent, the decree must be taken as *prima facie* true; and the burden is upon the creditors attacking it to show the fraud: *Old Folk's Soc. v. Millard*, 86 Tenn. 657. One who attacks a wife's title to realty on the ground of fraud, because it was bought with her husband's money to defraud creditors, has the burden of proving such fraud: *Gilbert v. Glenay*, 75 Iowa, 513. A wife who buys property from her husband must assume the burden of proving that she paid for the same out of funds not furnished by him, in case the conveyance is attacked by the husband's creditors: *Burt v. Timmons*, 20 W. Va. 441; 6 Am. St. Rep. 664, and note 676. An averment of ignorance of fraud, until a time within statutory limitation, made by plaintiff in a bill to set aside the conveyance as fraudulent, casts the burden of proving the contrary upon defendant: *Gobold v. Lambert*, 8 Rich. Eq. 155; 70 Am. Dec. 192. The burden of proving that an assignee of a fraudulent mortgage is not a *bona fide* purchaser for value, without notice of the fraud, is upon the defendant, in a suit by the assignee to foreclose the mortgage: *Danbury v. Robinson*, 14 N. J. Eq. 213; 82 Am. Dec. 244. The transaction is presumptively fraudulent, and it is incumbent upon the son to show conclusive good faith, where a son, believing that his father was incompetent to manage his affairs, took charge of them, his father passively consenting, and induced the father to transfer all his property to him: *Jacox v. Jacox*, 40 Mich. 473; 29 Am. Rep. 547. In a gift by a weak-minded husband to his wife, the burden is upon the wife to show that the act of the husband was intelligent, and free from undue influence: *Haydock v. Haydock*, 34 N. J. Eq. 570; 38 Am. Rep. 285; and to the same effect is *Darlington's Appeal*, 86 Pa. St. 512; 27 Am. Rep. 726. In a conveyance by a minor to one *in loco parentis*, on the day of attaining his majority, the burden is upon the grantee to show the utmost good faith and fairness in the transaction: *Bertmeyer v. Kellerman*, 32 Ohio St. 239; 30 Am. Rep. 577. The burden of proof rests upon a person occupying a fiduciary relation to show justice and fairness in transactions between himself and the person trusting him: *Fisher v. Bishop*, 108 N. Y. 25; 2 Am. St. Rep. 357, and note 361; *Traphagen v. Voorhees*, 44 N. J. Eq. 21. Where it appears that a grantor conveyed to E. to defraud his wife out of alimony, the burden of proving want of notice sufficient to make him a *bona fide* purchaser is upon E., inasmuch as that fact lies peculiarly within E.'s knowledge: *Weber v. Rothschild*, 5 Or. 385. Where, on a charge

of fraud, the evidence is as consistent with honesty as dishonesty, it will be construed in favor of honesty: *Webb v. Darby*, 94 Mo. 621.

Recent Cases as to the Evidence Required in Fraudulent Conveyances in General. — Fraud, like any other fact, may be established by a preponderance of the evidence merely: *McCreary v. Skinner*, 75 Iowa, 411; and the rule in civil cases as to proving fraud does not require the proof to be made to a moral certainty, beyond a reasonable doubt: *Wylie v. Posey*, 71 Tex. 34. Direct proof of fraud can seldom be obtained, but it may be shown by the conduct and appearance of the parties, the details of the transaction, and the surrounding circumstances: *Cox v. Cox*, 39 Kan. 121; *Armstrong v. Lachman*, 84 Va. 726; but circumstances of mere suspicion are not sufficient to warrant the conclusion of fraud: *Fraser v. Passage*, 63 Mich. 551. In a suit to reform a deed, the evidence of fraud must be clear and satisfactory: *Monks v. McGrady*, 71 Tex. 134; *Raymond v. Cox*, 44 N. J. Eq. 415.

Badges of Fraud. — The usual badges of fraud are: Gross inadequacy of consideration; no security taken for purchase-money; unusual credit; bonds taken at long periods; conveyance in payment of alleged antecedent indebtedness of a father to a son, the two residing together; threats and pendency of suits; concealment of the transaction; keeping the deed unacknowledged and unrecorded for considerable time; grantor retaining possession as before conveyance; and any one or more of these facts may make a case of *prima facie* fraud, calling for an explanation from the parties: *Hickman v. Trout*, 83 Va. 478; *Philbrick v. O'Connor*, 15 Or. 15; *Young v. Willis*, 82 Va. 291; *Blum v. McBride*, 69 Tex. 60; *Cooper v. Davison*, 86 Ala. 368; *Little v. Ragan*, 83 Ky. 321. And so a voluntary conveyance of one's property to avoid liability for his unlawful acts is a badge of fraud: *Cole v. Terrell*, 71 Tex. 549; so taking a conveyance in the name of another is a badge of fraud as against prior creditors: *Eiler v. Crull*, 112 Ind. 318; and so a voluntary conveyance by one who has existing liabilities is a fraud upon the creditors: *Yankey v. Sweeney*, 85 Ky. 55; *Jordan v. Buschmeyer*, 97 Mo. 94. A conveyance absolute on its face, but in fact a mere security, is constructively fraudulent against the existing creditors of the grantor, even though no fraud was intended: *Watkins v. Arms*, 64 Mich. 99.

Fraud as between Persons in Fiduciary Relations. — Less proof is required to establish fraud between parties in confidential or fiduciary relations than otherwise: *Fisher v. Bishop*, 108 N. Y. 25; 2 Am. St. Rep. 357, and note 361; *Fisher v. Herron*, 22 Neb. 183; *Gibson v. Cunningham*, 92 Mo. 131; and the existence of fraud in conveyances between persons in fiduciary relations is presumed until rebutted by something to the contrary; as conveyances between an administrator and distributee in favor of the former: *Williams v. Powell*, 66 Ala. 20; 41 Am. Rep. 742; or between brother and sister for an inadequate consideration: *Gillespie v. Holland*, 40 Ark. 28; 48 Am. Rep. 1; or between guardian and ward in favor of the former: *Ferguson v. Lowrey*, 54 Ala. 510; 25 Am. Rep. 718; or between a son and an imbecile parent: *Jacobs v. Jacobs*, 40 Mich. 473; 29 Am. Rep. 547; or between a husband and his wife: *Haydock v. Haydock*, 34 N. J. Eq. 570; 38 Am. Rep. 385; *Boyd v. De la Montaigne*, 73 N. Y. 498; 29 Am. Rep. 197; *Darlington's Appeal*, 86 Pa. St. 512; 27 Am. Rep. 726; or between a man and a prostitute whom he believes to be his wife: *Shipman v. Furniss*, 66 Ala. 555; 44 Am. Rep. 528; or between affianced parties: *Gilman v. Burch*, 7 Or. 374; 33 Am. Rep. 710; or between parents and children discriminating against other children: *Wessel v. Rathjohn*, 89 N. C. 377; 45 Am. Rep. 696.

FARRELL v. RICHMOND AND DANVILLE R. R. Co.

[102 NORTH CAROLINA, 390.]

PLEADING AND PRACTICE — INSTRUCTIONS TO JURY. — Instruction to jury that if they should believe a certain state of facts the plaintiff is not entitled to recover, though proper upon the general issues submitted, under the practice at common law, is confusing when applied to the system of code practice, and should not be continued.

SALES — RIGHT OF STOPPAGE IN TRANSITU. — If after the vendor has delivered goods out of his own possession, and put them into the hands of a carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and his right to do this is called the right of stoppage *in transitu*. The right arises solely upon the buyer's insolvency, unknown to the vendor at the time of the sale, and is based upon the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. It is a right highly favored on account of its intrinsic justice, and it may be exercised at any time before the goods are actually or constructively delivered by the carrier to the buyer.

VENDOR'S RIGHT OF STOPPAGE IN TRANSITU IS PARAMOUNT TO ALL LIENS against the vendee, even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee, and to the lien of an attachment or execution against the vendee levied before the delivery of the goods to him.

COMMON CARRIERS — CARRIER'S STIPULATION FOR LIEN SUBORDINATE TO RIGHT OF STOPPAGE IN TRANSITU. — A stipulation in a bill of lading, which the vendor and shipper of goods takes from the carrier, that "the several carriers shall have a lien upon the goods (shipped) for all arrearages of freight and charges due by the same owners or consignees on other goods," if binding at all, is entirely subordinate to the consignor's right of stoppage *in transitu*, and is ineffectual to give the carrier a lien such as stipulated for, which will take precedence of such right.

COMMON CARRIERS — CONSTRUCTIVE DELIVERY OF GOODS. — There being no actual delivery of goods by a carrier to the consignee, a constructive delivery can only be effected by an agreement on the part of the carrier, either express or implied, to hold the goods for the consignee, not as carrier, but as his agent.

CIVIL action brought by Farrell & Co. against the Richmond and Danville Railroad Company. The plaintiffs alleged that they were residents of Philadelphia, Pennsylvania, and that they sold a safe on credit to Robertson and Rankin, of Durham, North Carolina; that they delivered it to the defendant for transportation to Durham, in said state, directed to said Robertson and Rankin; that after said shipment, and before its delivery to the purchasers, the plaintiffs learned that the purchasers were insolvent, and that they notified the defendant not to deliver the safe to said purchasers, or any other person but the plaintiffs, at the same time tendering to the defendant the freight and all other charges on said safe,

and demanding the delivery thereof; that the defendant refused to surrender said safe, but retained the same wrongfully, etc. The answer denied that the defendant wrongfully withheld the said safe from the plaintiffs, and alleged that Robertson and Rankin, being indebted to the defendant in a certain sum, the defendant sued out a warrant of attachment against the said property before the defendant had any notice of the plaintiffs' claim on said safe, and before any demand made by them for the same, and that under the judgment and execution in said proceeding the defendant purchased said safe. The defendant also alleged that after the safe was received at its warehouse in Durham it was delivered to Robertson and Rankin, and by them delivered to one Holt, agent of the defendant at Durham, to be held by him as security for certain indebtedness then due and owing to the defendant by the said Robertson and Rankin. Other facts appear in the opinion. There was a verdict for the plaintiffs, and the defendant appealed.

E. C. Smith and W. W. Fuller, for the plaintiffs.

D. Schenck and C. M. Busbee, for the defendant.

SHEPHERD, J. Several objections were made to the testimony, all of which, we think, were properly overruled. That which relates to the witness speaking of the contents and effect of exhibit A would have been tenable, but as the exhibit was subsequently introduced, and was entirely consistent with the witness's statement, the defendant was in no wise prejudiced, and the exception is therefore without merit.

It is proper to notice that the third instruction asked by the defendant was, that if the jury should believe a certain state of facts, "the plaintiffs are not entitled to recover."

The same words are used by the court in one of the instructions given. Such language is not pertinent to any of the issues submitted.

These present questions of fact, or mixed questions of law and fact, and upon the findings, it is for the court to say whether or not the plaintiffs are entitled to recover. Such instructions were proper upon the general issues submitted under the old practice, but are confusing when applied to our present system.

It is true that in the present case no harm has resulted, as we can dispose of the appeal upon the testimony of the defendant; but we have adverted to this improper manner of

asking for and giving instructions in order that the loose practice in this respect may be discontinued. We can very readily conceive how juries may be perplexed and misled by such general charges when they come to pass upon the specific issues submitted to them, and how new trials may be thus made necessary, which could otherwise have been easily avoided.

The plaintiff's right is based upon this alleged right to stop the property *in transitu*. This right "arises solely upon the insolvency of the buyer, and is based upon the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, as we have seen, . . . is such a constructive delivery as divests the vendor's lien), he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people." It is "highly favored on account of its intrinsic justice": 2 Benjamin on Sales, secs. 1229-1231. It "is but an equitable extension or enlargement of the vendor's common-law lien for the price, and not an independent or distinct right": Note to sec. 1229, *supra*. "It is quite immaterial that the insolvency existed at the time of the sale, provided the vendor be ignorant of the fact at the time": *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17; and a number of cases cited in note to section 1244, 2 Benjamin on Sales.

These last authorities fully sustain his honor in refusing the third instruction asked by the defendant. The mere fact that Robertson and Rankin, the consignees, were insolvent at the time of the sale, could not defeat the lien of the plaintiffs unless they knew of such insolvency.

The charge as given was correct in this particular, the jury having found substantially that the plaintiffs were, nothing further appearing, entitled to avail themselves of the right of stoppage *in transitu*, and that they exercised that right through their agent, Mr. Fuller. We will now consider the several defenses made by the defendant. No agreement or usage having been shown to the contrary, the right of stoppage *in transitu* continued until the safe was actually or constructively delivered to the consignee: 2 Benjamin on Sales, sec. 1269; *Hause v. Judson*, 29 Am. Dec. 377, and notes.

1. The first defense, though not seriously pressed upon the argument, is, that the defendant acquired title by reason of the sale under the attachment proceedings instituted by it against the consignee for arrearages of freight due on lumber.

"The vendor's right of stoppage *in transitu* is paramount to all liens against the purchaser": Hilliard on Sales, 289; *Blackman v. Pierce*, 23 Cal. 508; "even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee": *Oppenheim v. Russell*, 3 Bos. & P. 42.

"An attachment or execution against the vendee does not preclude the stoppage *in transitu*; for this is not a taking possession by the vendee's authority, the proceeding being *in invitum*": Note to *Hause v. Judson*, *supra*, where a large number of authorities sustaining the text is collected. These authorities conclusively settle that the defense under the attachment proceedings cannot be maintained.

2. The second defense rests upon the following clause of the bill of lading: "The several carriers shall have a lien upon the goods (shipped) for all arrearages of freight and charges due by the same owners or consignees on other goods."

The counsel for the defendant could give us no authority in support of this defense, and none, we think, can be found, to the effect that such a stipulation should be construed to take away this "highly favored" and most important right of the vendor to preserve his lien, in order that his goods may "not be applied to the payment of another man's debts," much less to those of his agent, to whom he delivers them for carriage. Shippers would hardly contemplate that in accepting such a bill of lading the well-established and cherished right of stoppage *in transitu* was to be made dependent upon whether a distant consignee was indebted to the carrier, and the commercial world would doubtless be surprised if it were understood that whenever such a stipulation was imposed upon consignors they were in effect yielding up their lien for the purchase-money, and substantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, by a possible insolvent vendee.

If such is the proper construction, we can well appreciate the language of Lord Alvanly, in *Oppenheim v. Russell*, 3 Bos. & P. 42, when he said that he hoped it would "never be established that common carriers, who are bound to take all goods to be carried for a reasonable price tendered to them, may impose such a condition upon persons sending goods by them."

He doubts whether an express agreement between the carrier and the consignor would be binding; and Best, J., in *Wright v. Snell*, 5 Barn. & Ald. 350, in speaking generally of such contracts, said he doubted "whether a carrier could make so unjust a stipulation." Chancellor Kent, in the second volume of his Commentaries, remarks that "it was again stated as a questionable point in *Wright v. Snell*, *supra*, whether such a general lien could exist between the owner of the goods and the carrier; and the claim was intimated to be unjust. It must, therefore, be considered a point still remaining to be settled by judicial decision." It is unnecessary, however, for us to say whether such a condition or agreement would be reasonable and binding, as it seems very clear that the present case is not susceptible of the construction contended for, and that it is entirely subordinate to the right of stoppage *in transitu*. The exercise of this right revested the right of possession in the plaintiffs; and they having tendered all they owed the defendant, no interest was ever acquired by the vendee to which the claim of the defendant could attach.

3. The third and most plausible defense is, that, according to the testimony of the agent, Holt, there was a constructive delivery to the consignee, and that this defeated the rights of the plaintiffs. The doctrine is well settled that "where goods are placed in the possession of a carrier to be carried for a vendor, to be delivered to the purchaser, the *transitus* is not at end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent; and the same principle will apply to a warehouseman or a wharfinger": Benjamin on Sales, *supra*. Was there any such agreement in this case? The most that can be said is, that the consignee offered to pledge the safe to the defendant for the freight already due on lumber. There was no actual change of possession. The safe was in the defendant's warehouse, and Holt, the agent, and the consignee, were both leaning upon it. The consignee, placing his hands on it, said: "I place this safe in your hands as security for what I owe." There was no response whatever by Holt. He simply states that he "held the safe till some little time afterwards," when he heard that the consignee had run away, and that he sued out the attachment proceedings mentioned in the answer.

The majority of us are doubtful whether there was reason-

ably sufficient evidence to be submitted to the jury upon the question of the acceptance of the offer, and of delivery.

There being no actual delivery, a constructive one can only be effected by a valid agreement on the part of the common carrier to hold for the consignee.

Mr. Benjamin, from whom we have so largely quoted, says that "the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and in order to overcome this presumption [the Italics are ours] there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him."

But conceding that the acquiescence of Holt was some evidence of the acceptance of the offer, would this, in law, amount to such a delivery as would defeat the plaintiff's right?

Passing by the question, as to whether the defendant bailee was not estopped to set up such a transaction in favor of itself, and against its principal (2 Wait's Actions and Defenses, 57), and also the fact that the alleged agreement was not to hold as agent of the vendee, but for itself, we are of the opinion that what transpired between the defendant's agent and the vendee did not alter in the slightest degree the relation in which they stood to each other.

It will be borne in mind that there was no actual delivery; that the defendant had a lien for the freight due on the property, and under the stipulation in the bill of lading, it had, as against the consignee, also a lien for the arrearages of freight due by him. There was no new consideration, and the proposition of the assignee, and its alleged acceptance by the defendant, left them in precisely the same position as before.

It amounted virtually to the defendant saying: "If you will pay the freight and arrearages, I will deliver you the safe." This was, as we have seen, the effect of the bill of lading. In the leading case upon this subject (*Whitehead v. Anderson*, 9 Mees. & W. 517, cited with approval by Benjamin, *supra*), the agent of the consignee went on board of the ship when she arrived in port, and told the captain that he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo

when he was satisfied about his freight. They went ashore together, and shortly after an agent of the consignor served a notice of stoppage *in transitu* upon the mate, who had charge of the cargo. Held, "that, under these circumstances, there was no actual possession taken of the goods by the consignees, and that as there was no contract by the captain to hold the goods, as their agent, the circumstances did not amount to a constructive possession of the goods by them. There is no proof of any such contract. A promise by the captain to the agent of the consignees is stated, but it is no more than a promise without a new consideration to fulfill the original contract, and deliver in due course to the consignees on payment of freight, which leaves the captain in the same situation as before. After the agreement, he remained a mere agent for expediting the cargo to its original destination."

This, it seems to us, is conclusive of our case. Here there was no new consideration whatever moving from the vendee, nor was there any definite understanding that the defendant was to forbear pressing the vague proceedings suggested by him: 1 Addison on Contracts, 2, note.

There was therefore no new contract, and the defendant held the safe in the same character as he did before, when, as we have shown, it was subject to the paramount claim of the plaintiffs. We have been able to find no case where a pledge of this kind has been asserted, but we have observed that all the cases we have examined lay down the rule that constructive delivery is only made by the carrier either agreeing expressly or by implication to hold as the agent of the consignee.

While the amount involved in this suit is small, we have thought it our duty, in view of the importance of the questions of law presented, to carefully examine many of the multitude of cases upon the subject, and our conclusion is, that his honor was correct in telling the jury that what transpired between Holt and Robertson (one of the consignees) did not amount to a delivery, and was not sufficient to deprive the plaintiffs of any rights they might acquire in respect to the safe.

Affirmed.

STOPPAGE IN TRANSITU. — The right of stoppage *in transitu* is favored by law: *Tufts v. Sylvester*, 79 Me. 213; 1 Am. St. Rep. 303, and note 305; compare *Allen v. Maine Central R. R. Co.*, 79 Me. 327; 1 Am. St. Rep. 310, and extended note 312-314. The vendor of goods may stop them in transit on account of the vendee's insolvency existing before, but not known to the vendor until after the sale: *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17; *Out-*

Allen v. Babcock, 21 Ohio St. 281; 6 Am. Rep. 63; *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84, and note 87; *Pattison v. Cullton*, 33 Ind. 240; 5 Am. Rep. 199; *Blum v. Marks*, 21 La. Ann. 268; 99 Am. Dec. 725; *O'Brien v. Norris*, 16 Md. 122; 77 Am. Dec. 284; *Jones v. Earl*, 37 Cal. 630; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Sawyer v. Joslin*, 20 Vt. 172; 49 Am. Dec. 768; *People v. Haynes*, 14 Wend. 546; 28 Am. Dec. 530; *Wood v. Roach*, 2 Dall. 180; 1 Am. Dec. 276; *Chapman v. Lathrop*, 6 Cow. 110; 16 Am. Dec. 433.

DE BERRY v. NICHOLSON.

[102 NORTH CAROLINA, 455.]

ELECTIONS. — IN PROCEEDING UPON QUO WARRANTO TO CONTEST ELECTION, IT IS COMPETENT for the court to look behind the precinct election returns to ascertain for what office the votes cast for certain candidates were given; and especially is this so where the pleadings admit that the contestants were the opposing and competing candidates for the office in dispute, and were voted for as such at the various polling-places in the county.

ELECTIONS — POWER OF CANVASSING BOARD. — Where the election returns from a polling precinct to the board of canvassers fails to show for what office the votes cast for certain candidates were given, it seems that the canvassing board may resort to the ballots themselves, or to the personal knowledge of a member of the board, to supply the defect or omission.

ELECTIONS — DESIGN OF ELECTION LAWS. — Rules prescribed by statute for conducting popular elections are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, and to ascertain with certainty the result. Such rules are directory merely, not jurisdictional or imperative, and the forms which must be observed as essential to the validity of an election are those only which affect the merits.

ELECTIONS. — IRREGULARITY IN CONDUCT OF ELECTION, which deprives no voter of his rights, nor admits a disqualified person to vote, nor casts any uncertainty upon the result, and which has not been occasioned by the agency of one seeking to derive a benefit from it, will be overlooked, when the only question is, which vote was the greatest.

ELECTIONS — OATH OF ELECTOR. — The oath prescribed by the North Carolina code, section 2681, to be taken by electors, in substance and legal effect fully meets the requirements of article 6, section 2, of the state constitution.

ELECTIONS — ADMINISTRATION OF OATH TO ELECTORS. — Where the form of oath used by the registrar was that prescribed in the statute, it will be inferred, in the absence of direct evidence to the contrary, that the oath was taken with uplifted hand, as specified in the statute, North Carolina code, section 3310, and was accepted as a valid mode of administering it by both the registrar and the elector. It is sufficient to meet the requirements of the election law that an oath was administered in a form sanctioned by the statute, and taken with a full recognition of its binding force.

ELECTIONS — IRREGULARITIES IN MANNER OF CONDUCTING ELECTION. — A disregard of directions found in the constitution or statutes, except as to the time and place of holding the election, the non-observance of which is designated as an irregularity merely, not affecting the result as a fair expression of the popular will, does not warrant a rejection of the vote given at a polling-place, and the same principle governs the registration of electors.

ELECTIONS. — **REGISTRATION OF ELECTOR WHO IS QUALIFIED TO VOTE MUST BE ACCEPTED** as the act of a public officer, and entitles the elector to the casting of his vote.

ELECTIONS. — **IT IS NOT SUFFICIENT REASON TO DEPRIVE QUALIFIED VOTER OF HIS VOTE**, that another has been registered who ought not to have been, and has no right to vote.

ELECTION IS NOT VITIATED BY FACT THAT REGISTRATION-BOOK WAS NOT KEPT OPEN during the whole prescribed period, on the Saturday preceding the election, when no one was denied the opportunity of examining the book.

ELECTION IS NOT VITIATED BY FACT that one of the election officers absented himself a short time from the polls, where it appears that no one voted during the interval, and that the ballot-boxes were not tampered with, and no opportunity was afforded for doing so.

WHERE VOTES WERE HANDED IN ROLLED UP and secured by an elastic band, and were distributed among the boxes by the judges, the provisions of section 2687 of the North Carolina code were not violated, and such votes were properly received and counted.

ELECTIONS — PROVINCE OF JUDGE AND JURY. — Where in response to an inquiry from the jury as to their right to pass upon the legality of certain votes, the judge answered in the negative, and advised them that they should take and act upon the law as laid down by him, — in this, not as a mandate, but as advice, — there was no error.

CIVIL action in which the state, on the relation of W. G. De Berry, was plaintiff, and J. A. Nicholson, defendant. The relator and the defendant were, at an election held in Richmond County, competing candidates for the office of registrar of deeds for said county, and were voted for as such at the various precincts therein. The returns to the board of canvassers coming from Wolf Pit township, while giving the votes cast respectively for the two candidates, omitted the name of the office for which the votes were cast. The canvassing board rejected the returns from Wolf Pit precinct for the defect mentioned, and declared the defendant to be elected, he having received of the votes cast at the other places of voting in the county 1,740 votes, and the relator 1,628 votes. There were cast at the rejected precinct for the relator 265, and for the defendant 105 votes, which, if counted, would have reversed the result, and given the relator a majority of 48 votes. The sole issue submitted to the jury is in these words: "Was the relator duly elected to the office of

register of deeds of Richmond County at an election held on the sixth day of November, 1888, and is he entitled to be inducted into said office?" They were instructed that "if they believed, from the evidence, that at said election 370 votes were cast for the candidates for the office of register of deeds for Richmond County, of which number the relator received 265, and the defendant 105, they should answer the issue in the affirmative." The jury retired, and while out sent to the judge the following question: "Is the legality of the votes a question for the jury?" The judge replied: "No; it is not"; and then repeated his charge, and instructed them to retire and make up their verdict. They thereupon responded to the issue in the affirmative. Upon this verdict, it was adjudged that the relator was rightfully entitled to said office, and to be admitted into its possession on complying with the conditions prescribed by law. The defendant excepted.

J. A. Lockhart, for the plaintiff.

P. D. Walker, for the defendant.

SMITH, C. J. The legality of the action of the canvassing board, in refusing to count, for the reason alleged, the votes cast in the township mentioned, in ascertaining the general result, is alone drawn in controversy in the action, and, to support that action, the appellant superadds and assigns numerous alleged irregularities and departures from the statutory regulations in the conduct of the election at that voting-place. These, enumerated in the answer, and urged in argument upon the hearing before us, are now to be considered, and their sufficiency to affect the result to be determined.

The defect in the return itself, as a ground for its entire exclusion from the count: The statute does require the canvassing board, in passing upon the returns conveyed to it by a designated judge of election, acting at the place of voting, to "make abstracts stating the number of legal ballots cast in each precinct for each office, the name of each person voted for, and the number of votes given to each person for each different office"; and this presupposes the return to furnish the information, without which the abstract could not be prepared. But, as the board judicially determines the result, is this omission irremediable, and fatal to the reception of the vote, or may it be supplied or deduced from attending facts?

When, from the possession of the other regular and unob-

jectionable returns, it is seen what persons were voted for, and to fill what offices, may not the knowledge thus obtained be used to supply the defect, in the absence of any suggestion that the electors voted for any others to fill the office? or may not the canvassing board resort to the ballots, or the personal knowledge of the member of the body who brings the return, in proof of the fact? It would be strange if so technical and rigid a rule of action should be sufficient to stifle so large an expression of the popular will, and defeat its operation in the choice of a public county officer. But however this may be in the action of the canvassing board, whose functions are largely ministerial, it is certainly competent in the court to which the wronged party appeals, in suing out the writ of *quo warranto*, to look behind the return to see for what offices the votes were given to the contesting candidates; and an inspection of the ballots themselves would very conclusively settle the inquiry, if it became necessary, the ballots being identified without further proof. In the present case, the fact is not disputed; for the complaint avers that the parties to the suit "were the opposing and competing candidates for the office of register of deeds for said county, and were voted for as such at the various polling-places, precincts, and townships in said county"; and this is admitted in the answer, with the sole qualification that the ballots cast in the disputed township were not legal.

The reason given for the rejection of the entire vote cast at this precinct failing to invalidate the election then held, and to warrant the retention of the office into which the defendant has been inducted, his counsel assails the vote on other grounds, alleging that,—1. The proper oath (and in some instances none was taken) was not administered to the electors before the registration of their names; 2. The registrar of voters was not legally appointed; 3. The failure to keep open for inspection the registration-books from nine, A. M., until five, P. M., on Saturday preceding the election; 4. The rolled-up votes were improperly received; and other deviations from the statutory regulations as found in volume 2 of the code, chapter 16, sections 2668 and following.

It is not pretended that persons incompetent to vote, for want of the necessary qualifications of an elector, have, in fact, been registered, but that the prerequisite conditions for such registration have not been observed, and their votes ought not to have been counted.

In *Southerland v. Goldsboro*, 96 N. C. 49, it is declared that registration, as prescribed in the constitution, is an essential prerequisite to the exercise of the right of suffrage, as much as the possession of the personal qualifications, without which no one is entitled to be registered, and that when such registration is made, the registration furnishes *prima facie* evidence of the right to vote, made, as it is, under officers of the law charged with that duty. So that here, in the registration, we have evidence of the personal qualifications of the voter, his right to be registered, and his actual registration, without any testimony to the contrary; and thus the sole question is as to the effect of the omissions to comply strictly with the law in the particulars pointed out, or others of a similar kind, upon the validity of the election held in the township in which they occurred. We propose to consider these alleged inequalities in a group, because the answer to them is common, and alike applicable to each.

In *Perry v. Whitaker*, 71 N. C. 477, an election to ascertain the will of the electors as representing the body of which they form a part, in reference to a prohibition of the sale of spirituous liquors in the township, was declared void, "for the reason that a large number of the citizens of the city were not allowed to vote, for the reason that they were not registered, and no opportunity was offered them to vote."

In *Swain v. McRae*, 80 N. C. 111, it is declared that the failure to have a new registration when ordered, because the order was made within thirty days of the time required by law for opening the books of registration, did not excuse the action of the canvassing board in excluding that precinct vote from the count made to ascertain the general result.

The true principle which should govern in cases of popular elections is thus concisely and clearly laid down in *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451, and reported as a leading case, with a valuable note, in Brightly's Leading Cases on Elections, 438:—

"The neglect of the inspectors or clerks to take an oath would not have vitiated the election. It might have subjected those officers to an indictment if the neglect was willful."

So Breese, J., in a carefully considered case in Illinois, thus more fully states the rule: "The rules prescribed by law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise,

and to ascertain with certainty the result. Such rules are directory merely, not jurisdictional or imperative. If an irregularity, of which complaint is made, be shown to have deprived no voter of his right, nor admitted a disqualified person to vote, if it cast no uncertainty upon the result and had not been occasioned by the agency of a party seeking to derive a benefit from it, it may well be overlooked in a case of this kind, when the only question is, which vote was the greatest. The forms which must be observed in order to render the election valid are those which affect the merits": *Platt v. People*, 29 Ill. 72.

We deem this a sound and just exposition of the law, and as furnishing a reasonable guide in solving controversies growing out of popular elections, which are becoming so numerous.

Judge McCrary, in his work on elections, speaking of irregularities in conducting them, which deviate from the provisions and directions of the statute, pushes the proposition further, and says that, "if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that this performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the merits of the election": Sections 187 to 190, inclusive.

It is urged with much emphasis in the argument for the defendant, that the form of the oath itself, and the manner in which it was administered to the voter, depart from the imperative demands of the constitution and the positive provisions of the statute to a degree that vitiates the registration of so large a number, that are thus rendered illegal voters, that, if excluded, would change the result of the election, and give it to the relator. There are estimated to be about four hundred votes which are exposed to this condemnation.

The registrar testifies that he did enter some names on the registry at first without swearing the persons, but does not undertake to state the number, nor does it appear for whom these voted, if they voted at all. But he says he did not swear those to whom he did administer the oath upon the Bible, without stating in what manner it was done; and that the form of the oath used was that prescribed in the statute: Code, sec. 2681. It is in these words: "I, —, do solemnly swear

[or affirm] that I will support the constitution of the United States and the constitution of the state of North Carolina; that I have been a resident of the state of North Carolina for twelve months, and of the county of — for ninety days; that I am a duly qualified elector, and that I have not registered for this election at any other precinct, and that I am an actual and *bona fide* resident of — township [or precinct]. So help me God."

Inasmuch as 400 or more voters were registered upon taking the oath in this form, and the total number of ballots cast were but 370, it must be inferred that all who did vote voted upon such oath. The contention is, that the rejection of the whole ballot operates only as an exclusion of those cast by persons alleged to have been illegally registered.

If the proposition of an illegal and incapacitating registration be conceded, the conclusion drawn follows as a consequence, and the entire ballot cast at the precinct must be discarded. But it ought to appear, to warrant this, that none of those voting were regularly and properly sworn; for it is no reason to deprive a qualified voter of his vote, that another has been registered who ought not to have been, and has no right to vote. In such case, the list should undergo expurgation, and those of the latter class—not qualified—stricken from the number given to the candidate for whom, when ascertained, the illegal votes were cast; for it is equally the right of the candidate receiving lawful votes to have them counted, as for the opposing candidate to have those that are not lawful rejected from the count.

But assuming the alleged taint to permeate the whole registry, is it such as to vitiate and annul the entire, or indeed any part of, the vote cast at the contested precinct?

The oath taken is that prescribed by the statute in the very words, and differs from that directed to be taken by section 2, article 6, of the constitution only in the omission of the words "and laws of the United States," following the word "constitution," and "laws of North Carolina not inconsistent therewith," following the same word in reference to the state. In substance and legal effect, the constitutional requirement is fully met in the oath as taken; for as the laws derive their force from the constitution, which gives authority for their enactment, it is plain that an obligation undertaken and a promise made "to support and maintain" the respective con-

stitutions extends to and embraces all legislative action which is authorized by and made pursuant to them, and the violation of a valid enactment is a violation of the constitution that imparts its sanction to the enactment.

The next objection is directed to the mode of administering the oath.

It must be inferred, in the absence of any direct evidence upon the point, that the oath was taken with uplifted hands, as specified in section 3310 of the code, and was accepted, as a valid mode of administering it by both the registrar and the elector. We regard this objection as equally untenable with the other.

The oath was administered in the form authorized by law (section 3310) for persons who have conscientious scruples about swearing upon the holy evangelist, as specified in the preceding section, in providing that such may be sworn with the right hand uplifted. Whether, if an inquiry had been instituted, the presence of such scruples would have been found to exist or not, it is quite sufficient that an oath was administered in a form sanctioned by the statute, and taken with a full recognition of its binding force upon the conscience, and of the responsibilities which are incurred by taking it.

Aside from these considerations, we are of the opinion that a disregard of those directions found in the law, fundamental or statutory (except as to the time and place of holding the election), relating to the manner of conducting it, designated as irregularities, not affecting the result as a fair expression of the popular will, does not warrant a rejection of the vote given at a polling-place. The same principle must govern the registering of the electors. If none are incompetent to vote who are put on the list, the registration must be accepted as the act of a public officer, and entitles the elector to the casting of his vote; and this, in my opinion, speaking for myself, even if there had been no oath in fact administered, so far as it concerns the elector and the person to whom he gives his ballot, just as other acts of the officer, acting *de facto* under color of office, and so recognized by the public, cannot be questioned by inquiring into his rightful title thereto in their relations to others. His acts, and the exercise of his functions, from the highest considerations of public policy, as affecting the interests of third persons, must be accepted as rightful and valid. This includes and disposes alike of the objection to the regis-

trar's appointment, and to his alleged non-observance of the statutory directions in placing the electors' names upon the registry. It is needful only to refer, in this connection, to *Norfleet v. Staton*, 73 N. C. 546, where the effect of acts of persons acting *de facto*, as such, and not *de jure*, is fully discussed, and authorities referred to.

In this case a judge, elected to fill a vacancy in the term of office in pursuance of an act of the general assembly, declared to be repugnant to the constitution, which itself provided a different mode of supplying the vacancy, made an appointment of clerk while so acting, the validity of which was called in question, and sustained upon an appeal to this court. Yet, in this case, an appointee, deriving his title under the constitution, was asserting his claims to the office, which were afterwards made good, and he inducted into possession.

The extension of the principle to those charged with the duty of conducting a popular election is fully supported by adjudications: *McCrary on Elections*, sec. 216.

The fact that the registration-book was not kept open during the whole prescribed period on the Saturday before the election cannot be allowed to render the election void, when it was kept open for inspection up to two, P. M., and no one was denied the opportunity of examining it or sought it afterwards. This does not vitiate the election.

Quite as little force is found in the objection that one of the officers absented himself for a short time for dinner, as it affirmatively appears, from the uncontradicted testimony, that no one voted during the interval, and tampering with the ballot-boxes did not take place, nor was opportunity afforded for it.

Again, there were many votes, more than a hundred as a witness testifies, handed in, rolled up, secured by an elastic band, which were given for the relator, and these were distributed among the boxes by the judges. These were, in our opinion, not obnoxious to the requirements of section 2687, and were properly received and counted: *DeLoatch v. Rogers*, 86 N. C. 357.

What has been said is an answer to the complaint made of the refusal of the court to give any of the fifteen instructions asked, which are based upon the imperfections and irregularities already considered and passed upon, and sustains the instructions given, which is confined to an inquiry as to the

state of the vote as actually given at the Wolf Pit township place of voting, about which, indeed, there was no controversy.

A further error is assigned in the response to an inquiry from the jury as to their right to pass upon the legality of the votes. The negative is the only answer that could be given, as it was a pure question of law, about which it was the duty of the judge to instruct, and them to be guided thereby.

It is true, the verdict involves an inquiry into the lawfulness of the votes, as well as their number, but it was eminently proper to advise the jury that they should accept the law as declared by the court, and apply it to the facts as they find them to be; for in this division and exercise of functions by the court and jury, concurrently leading to the verdict, can the law be properly administered in the courts and enforced before juries. The response of the judge is, in substance, that the jury should take and act upon the law as laid down by him.

In this, not as a mandate, but as advice, there is no error.

The judgment must therefore be affirmed, and it is so ordered.

ELECTIONS—REGISTRATION.—The law providing for the registration of voters does not add a new qualification to those prescribed by the constitution: *Oapen v. Foster*, 12 Pick. 485; 23 Am. Dec. 632, and note; *Page v. Allen*, 58 Pa. St. 338; 98 Am. Dec. 272; compare *State v. Corner*, 22 Neb. 265; 3 Am. St. Rep. 267.

ELECTIONS—HARMLESS IRREGULARITIES.—Contestants cannot take advantage of irregularities committed by themselves: *Louisville etc. R. R. Co. v. Davidson Co.*, 1 Sneed, 637; 62 Am. Dec. 424. Reception of illegal votes, not affecting the result, is a harmless irregularity: *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141; *People v. Cook*, 8 N. Y. 67; 59 Am. Dec. 451. The duties of election boards being merely ministerial, their omissions are harmless irregularities: *People v. Van Cleve*, 1 Mich. 362; 53 Am. Dec. 69. In the trial of a contested election case, the issue is, Who received the highest number of votes? If that question can be decided, any errors and irregularities of the contest court must be deemed harmless: *Blue v. Peter*, 40 Kan. 701. In an action to declare an election void upon the ground of irregularities, the courts have jurisdiction, and it is their duty to ascertain and declare the true result of the election, and if this can be done, the election will be enforced, though irregularities may appear to have occurred in the manner of conducting the election: *Riggsbee v. Board of Commissioners*, 99 N. C. 341. The directions, under the Virginia statutes, providing that county elections shall be subject to inquiry by the county courts on petition of fifteen qualified voters, to which two shall take and subscribe an oath, are as to form merely directory, and a failure to comply therewith will not vitiate further proceedings: *Nelson v. Vaughan*, 84 Va. 696.

ELECTIONS—QUALIFICATIONS OF VOTER.—A vote must be presumed to be legal until the contrary is shown: *Moss v. Patterson*, 40 Kan. 720. The voter must have resided in the proper locality for the requisite length of time before the election: *State v. McMillen*, 23 Neb. 385. The qualifications requisite for electors do not necessarily apply to officers, in absence of any constitutional or statutory provision to that effect: *State v. George*, 23 Fla. 585. Six months' residence in a Florida town does not, nor does registration, constitute a requisite to eligibility to office, if such town is incorporated: *State v. George*, 23 Id. 585; compare *Kreiss v. Behrensmeier*, 125 Ill. 141; 8 Am. St. Rep. 349.

CASES
IN THE
SUPREME COURT
OF
OREGON.

**DURBIN v. OREGON RAILROAD AND NAVIGATION
COMPANY.**

[17 OREGON, 8.]

RAILROAD COMPANIES — CROSSINGS. — LAW ASSUMES THAT THERE IS DANGER AT RAILROAD CROSSINGS, to avoid which requires the exercise of care and prudence commensurate with the nature of the place or risk involved. And when one approaches a point upon the highway crossed by a railroad track, it is his duty, whether on foot or in a wagon, to exercise a care for his own safety, and especially to look and listen before attempting to cross.

RAILROAD COMPANIES — DEGREE OF CARE EXACTED FROM TRAVELER AT CROSSING. —The law imposes a duty upon a person about to cross a railroad to use his eyes and ears, to look out for sign-boards and signals, and to listen for bell and whistle; and although the view of the road be obstructed, he is not relieved from the obligation to listen and ascertain, if he can, whether there is an approaching train. Nor will the fact that the train is behind time, or that it was a special train, or the failure to give the signal of its approach at the crossing, excuse the non-performance of this duty.

NEGLIGENCE — NONSUIT. — NEGLIGENCE IS ORDINARILY QUESTION OF FACT FOR JURY TO DETERMINE, from all the circumstances of the case; and the cases where a nonsuit is allowed are exceptional, and confined to those where the uncontradicted facts show the omission of acts which the law adjudges negligent.

RAILROAD COMPANIES — CONTRIBUTORY NEGLIGENCE. —The plaintiff attempted to pass a railroad crossing with a team and wagon. A passenger train had just gone by, and the plaintiff did not expect another train at that time, although she had seen a freight train standing on the track, headed that way, in the town she had just left. She had traveled over the crossing many times a year for several years, was familiar with the place and its surroundings, knew that the view was obstructed by an intervening hill, and regarded the crossing, under the circumstances of its

situation, as so dangerous that she had always before stopped and listened, and if she did not hear the train, she, or some companion for her, went forward and looked up the track before venturing to cross it. On this occasion, she drove directly on the track without stopping to look or listen, her team came into collision with a passing engine, killing one horse, and overturning the wagon. In such case, the plaintiff's own negligent act contributed to the injury which she sustained by the collision, and the motion for a nonsuit ought to have been allowed.

Olmstead and Anderson, Dolph, Bellinger, Mallory, and Simon, for the appellant.

Hyde and Hyde, and A. J. Lawrence, for the respondent.

LORD, C. J. This was an action to recover damages for the alleged negligence of the defendant in running a train of cars against the horses hitched to the wagon in which the plaintiff was crossing the defendant's track. At the trial, when the plaintiff rested her case, the defendant moved for a nonsuit, which the court overruled, and the defendant excepted. It is enough to say that a verdict was returned for the plaintiff, and that the present appeal brings up the judgment rendered thereon, and the record of the proceedings upon the trial.

The main contention is confined to the error assigned,—in not granting the motion for a nonsuit. This is claimed upon the ground that, from the evidence submitted by the plaintiff, it clearly appeared that it was the negligence of the plaintiff which occasioned the collision, and caused her injury. The evidence of the plaintiff shows that she and Mrs. Huntington, and a child of the latter, left the town of Huntington with a team and express-wagon to visit some friends in the country, and that after they had traveled west a couple of miles or so, the west-bound passenger train came along and passed them; that as she left Huntington she saw standing on the track a freight train headed west, to which engines were attached, with steam up, but that, after the passenger train had passed, she thought nothing more of any trains coming; that in driving around the point of the hill or mountain through which the railroad is cut, and across which the county road runs diagonally, and just as she was crossing the railroad track, and the front feet of the horses had reached the rail, she saw the engine approaching, not more than the length of a rail distant; that she tried to back the horses, but that before she could make them back, the train struck the horses, killing one, and overturning the wagon. Her testimony also shows that she had traveled over the crossing many times a year for

several years, was familiar with the place and its surroundings, knew the view was obstructed on account of the intervening hill, and regarded the crossing, under the circumstances of its situation, as so dangerous that she had always before stopped and listened, and if she did not hear the train, she, or some companion for her, went forward and looked up the track before venturing to cross it. She says, in reply to the inquiry whether "she had ever taken any pains to find out whether trains were passing," that "I have got down when I was passing alone and tied my horses, and went and looked; and at other times, if any one was with me, I got them to hold the team, and went and looked, or got them to go and look for me," and that she "always regarded it as a dangerous place. . . . The reason I did not get down and examine the track this time as I had done before was, that the passenger train had gone by, and I was not expecting any train from Huntington, and I knew it was not time for the helper to go down until the passenger train had got to Weatherby."

It is clear and undisputed that neither the plaintiff nor Mrs. Huntington listened, on approaching the crossing, to find out whether a train was coming, notwithstanding they knew the view of the track was obstructed, and that the crossing, by reason of the nature of the cut, and the location of the county road across it, was more than ordinarily dangerous, but drove directly on the track without thinking anything about it, or observing the usual precautions required for safety, because the passenger train had passed them, and the plaintiff did not think any other train was coming. There is no doubt, if she had listened, she could have heard the approach of the train, and avoided the accident. But it is sought to discriminate this case from the general rule applied to travelers in approaching railroad crossings, and to excuse the failure or neglect of the plaintiff to listen, on the ground that the evidence showed that she knew the time of the running of the trains, and as the passenger train had passed them, she knew no other train would be due for some time, and consequently the fact whether her failure to listen under the circumstances was such contributory negligence as should defeat her recovery was for the jury to decide.

The law assumes that there is danger at railroad crossings, which, to avoid, requires the exercise of care and prudence commensurate with the nature of the place or risk involved. It is laid down by the courts and text-writers, when one ap-

proaches a point upon the highway crossed by a railroad track it is his duty, whether on foot or in a wagon, to exercise a care for his own safety, and especially to look and listen before attempting to cross it.

"The rule is well established," said Miller, J., "that it is the bounden duty of a traveler approaching a railroad crossing, before he passes over the same, to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears, for the purpose of ascertaining whether a train is approaching; and if by proper use of his faculties he could have discovered the train and escaped injury, and fails to do so, he is chargeable with contributory negligence, and no recovery can be had": *Salter v. Railroad Co.*, 75 N. Y. 273.

"He must assume," says Mr. Beach, "that there is danger, and act with ordinary prudence and circumspection upon the assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings, as affecting the traveler, is no longer a question for the jury. The *quantum* of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all courts enforce this reasonable rule": Beach on Contributory Negligence, sec. 68, and authorities cited in note, and also sec. 9. Nor will the fact that a train is behind time relieve the traveler of the duty of care and caution; railroad companies have the right to run trains at all times, and those having occasion to cross their tracks are entitled to no exemption from care and vigilance because trains are irregular or extra trains are put on.

"Assume in this case," said Harris, J., "that it was negligence in the railroad company to be behind time, and will this in law excuse the defendant from observing care on his part? In my opinion it will not. Such a rule would be extremely dangerous, and there would be much difficulty in its application. It may be that those who live in the immediate vicinity of railroads, and who frequently cross them, may, when they suppose a train has just passed, be less careful, and this may grow into a habit, or they may consult time-

tables, and from them reason that there can be no locomotive near, and act without regard to care; but if they do so, in my opinion they act at their peril. They will be charged with negligence in case they rush on the track without looking or trying in a proper way to ascertain the fact whether danger is near, and they will not be permitted to recover damages for any injury they sustain": *Dascomb v. Railroad Co.*, 27 Barb. 226.

So that it seems that though a person or traveler may know the usual time of the running of different trains, from the fact that they may know that a train has passed, and that another train will not be along for some time according to their information or the time-table, it does not relieve him of the duty of observing care and prudence, or of using his faculties when he approaches and attempts to cross a railroad track. The law requires of him to make a reasonable use of his senses, and if the view of the track is obstructed, he must use his sense of hearing, and if he neglects to do so, and a collision results, he suffers by consequence of his own negligent act, and is not entitled to recover. He who fails to exercise this precaution when there are no circumstances to disturb his judgment, or impede his action at the time, is not using ordinary care.

It has been said: "The track itself is a warning of danger, and I think it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and if either cannot be rendered available, the obligation to use the other is the stronger to ascertain, before attempting to cross it, whether the train is in dangerous proximity; and if they neglect to do this, but venture blindly upon the track without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence, and should be so pronounced by the courts as matters of law": *Christian, J., in Railroad Co. v. Miller*, 25 Mich. 290.

"As the plaintiff could not use his eyes with effect," said Crockett, J., "it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion. Upon the plaintiff's statement of the facts, we hold that he was guilty of contributory negligence in failing to stop his team to listen for an approaching train": *Flemming v. Railroad Co.*, 47 Cal. 256.

"But aside from this fact," said Field, J., "the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others": *Railroad Co. v. Houston*, 95 U. S. 697.

"A railroad crossing is a place of danger, and common prudence requires that a traveler on the highway as he approaches one should use the precaution of looking to see if a train is approaching. If he fails to do so, the general knowledge and experience of men at once condemn his conduct as careless": *Allyn v. Railroad Co.*, 105 Mass. 79.

Again, it is said that a traveler should always approach a railway crossing under the apprehension that a train is liable to come at any moment; and while he may presume that those in charge of it will obey the law by giving the signals, the law will nevertheless require that he obey the instincts of his self-preservation, and not thrust himself into a situation which, notwithstanding the failure of the railroad, he might have avoided by the careful use of his senses": *Railroad Co. v. Butler*, 2 N. E. Rep. 138; see also *Railroad Co. v. Richter*, 34 N. J. L. 180; note and case cited on page 226, 2 Am. & Eng. R. R. Cas.; *Payne v. Railway Co.*, 13 Lea, 522; 49 Am. Rep. 666; *Scharfuth v. Railway Co.*, 62 Iowa, 624; *Henze v. Railway Co.*, 71 Mo. 636; *Railroad Co. v. Beale*, 73 Pa. St. 504; *Railroad Co. v. Clarke Com.*, 73 Me. 168; *Haas v. Grand R. R. Co.*, 47 Mich. 401; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Railroad Co. v. Adams*, 33 Kan. 427; *Railroad Co. v. Ritchie*, 102 Pa. St. 425; 9 Am. & Eng. R. R. Cas. 261; 1 Thompson on Negligence, 424, 426, and cases cited.

It thus appears to be a duty imposed by the law upon a person about to cross a railroad to use his eyes and ears,—to look out for sign-boards and signals, and to listen for bell and whistle,—and if the view of the road is obstructed, it does not relieve him of the obligation to listen and ascertain, if he can,

whether there is an approaching train. Nor will the fact that the train is behind time (*Salter v. Railroad Co.*, 75 N. Y. 273; *State v. Railroad Co.*, 47 Md. 76), or that it was a special train (*Schofield v. Railroad Co.*, 114 U. S. 615), or the failure of the railroad to give the signal of its approach at the crossing (see case *supra*), excuse the non-performance of this duty.

In many of the cases, the measure of duty goes to the extent of requiring the traveler to stop, in order to look or listen, but he is not required to get out of his wagon, and go forward on foot, for the purpose of looking (*Stakus v. Railroad Co.*, 79 N. Y. 467; *Davis v. Railroad Co.*, 47 Id. 400; *Railroad Co. v. Wright*, 80 Md. 182), unless there are some particular circumstances requiring it: *Railroad Co. v. Beale*, 73 Pa. St. 509.

Now, the plaintiff was a competent person to take care of herself, was familiar with the road and its intersections with the railroad, and fully understood, from the obstructed view, the danger and risk incurred in attempting to cross it without listening. There is no pretense that her team was or became unmanageable or unduly excited, or that there were any circumstances embarrassing or perturbing her judgment, or that she was in the presence of any entangling influences or conditions to perplex or confuse her mind. She was in the full possession of all her faculties, and if she had listened, could have heard the train, yet, relying on the fact that the passenger train had passed, and that no other train was due for some time, she relaxed her vigilance, and drove on the track, and in collision with the train. "If the obstruction had been such," said Johnson, J., "as to prevent her from seeing the track or train, then, in the exercise of ordinary care, she should have listened for the train": *Railroad Co. v. Adams*, 33 Kan. 431. Upon this state of facts, what doubtful or qualifying circumstances does the conduct of the plaintiff present which excuses her from the plain consequences of her negligent acts? The only duty which the law imposed for her own safety, as well as the lives of passengers on trains, she neglected and disregarded under circumstances which demanded the exercise of prudence and caution.

It is true that negligence is ordinarily a question of fact for the jury to determine, from all the circumstances of the case, and that the cases where a nonsuit is allowed are exceptional, and confined to those, as here, where the uncontradicted facts show the omission of acts which the law adjudges negligent.

In such cases, when the measure of duty is defined by law,

then, says Mr. Beach, "a failure to attain the standard is negligence in law, and a matter with which a jury can properly have nothing to do. This is the principle upon which *Cogswell v. O. & C. R. R. Co.*, 6 Or. 417, was decided by Boise, J.": Beach on Contributory Negligence, sec. 163.

We think, upon the undisputed facts of this case as made by the plaintiff, her own negligent act contributed to produce the injury which she sustained by the collision, and that the motion for nonsuit ought to have been allowed. It follows that the judgment must be reversed, with directions that a judgment for nonsuit be entered.

RAILWAYS—NEGLIGENCE.—When negligence is a question of fact for the jury, and when a question of law for the court: *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; *ante*, p. 617, and note; *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; *ante*, p. 87, and note; *Village of J. v. Chapman*, 127 Ill. 438; *ante*, p. 136, and note; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note; *East Linn etc. R'y Co. v. Scott*, 71 Tex. 703; 10 Am. St. Rep. 804, and note; *Baltimore etc. R. R. Co. v. Kune*, 69 Md. 11; 9 Am. St. Rep. 387, and note; *City R'y Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798, and note 801, 802; *Kelly v. Inhabitants of Blackstone*, 147 Mass. 448; 9 Am. St. Rep. 730; *Houston etc. R'y Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note; *Rolseth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637, and note; *Delaware etc. R. R. Co. v. Cadow*, 120 Pa. St. 559; 6 Am. St. Rep. 730, and note; *Nugent v. Boston etc. R. R.*, 80 Me. 62; 6 Am. St. Rep. 151, and note; *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; *Selinas v. Vermont etc. Soc.*, 60 Vt. 249; 6 Am. St. Rep. 114, and note; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note; *Reagan v. St. Louis etc. R'y Co.*, 93 Mo. 348; 3 Am. St. Rep. 542; *West Mahoney Twp. v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604; *South Side etc. R'y Co. v. Trick*, 117 Pa. St. 390; 2 Am. St. Rep. 672, and note; *Bliss v. Inhabitants of South Hadley*, 145 Mass. 91; 1 Am. St. Rep. 441; *Klanowski v. Grand Trunk R'y Co.*, 64 Mich. 279; *Guggenheim v. Lake Shore etc. R'y Co.*, 66 Id. 151; *Nichols v. Chicago etc. R'y Co.*, 36 Minn. 452; *Philadelphia etc. R. R. Co. v. Frank*, 67 Md. 339; *Timins v. Chicago etc. R'y Co.*, 72 Iowa, 94; *Winstanley v. Chicago etc. R'y Co.*, 72 Wis. 375; *International etc. R. R. Co. v. Kuehn*, 70 Tex. 582; *McDonough v. Milwaukee etc. R. R. Co.*, 73 Wis. 223; *Rhines v. Chicago etc. R'y Co.*, 75 Iowa, 597; *Peterson v. Chicago etc. R'y Co.*, 64 Mich. 42; *Buchanan v. Chicago etc. R'y Co.*, 75 Iowa, 393; *Dennis v. Louisville etc. R'y Co.*, 116 Ind. 42; *Battishill v. Humphreys*, 64 Mich. 514. In an action by a car-coupler against the railway company, there being some evidence tending to establish negligence as charged in the complaint, a nonsuit was properly refused: *Hornsbey v. South Carolina R'y Co.*, 26 S. O. 187. In an action for killing an ox on a railroad, the evidence being conflicting, and there being no evidence that plaintiff was himself negligent, a nonsuit was properly refused: *Welch v. Abbot*, 72 Wis. 512; compare *Wallingford v. Columbia etc. R. R. Co.*, 26 S. O. 258.

RAILWAYS—CROSSINGS.—Persons walking upon or about to cross a railway track must look and listen for approaching trains, and failing in this, they are guilty of such negligence as will ordinarily defeat an action for injuries sustained: *State v. Baltimore etc. R. R. Co.*, 69 Md. 494; 9 Am. St. Rep. 436, and note 439-442; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813, 814; *Weeks v. New Orleans etc. R. R. Co.*, 40 La. Ann. 800; 8 Am. St. Rep. 561; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note 174; *O'Connor v. Missouri P. R'y Co.*, 94 Mo. 150; 4 Am. St. Rep. 364, and cases collected in note 368; *Moebus v. Herrmann*, 106 N. Y. 349; 2 Am. St. Rep. 440, and note 443; *Louisville etc. R'y Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; *Pennsylvania R'y Co. v. Bell*, 122 Pa. St. 58; *Guggenheim v. L. S. etc. R'y Co.*, 66 Mich. 151; *Norfolk etc. R. R. Co. v. Burge*, 84 Va. 63; *Chicago etc. R'y Co. v. Hedger*, 118 Ind. 6.

RAILWAY CROSSINGS—DUTY REQUIRED OF THE RAILWAY COMPANY.—A railway company is required to ring the bell or sound the whistle only when approaching a crossing: *Dahlstrom v. St. Louis etc. R'y Co.*, 96 Mo. 99. Except at crossings, and within the limits of cities, towns, and villages, a railway company is under no obligation to maintain a special lookout for trespassers upon its track, but is bound to use reasonable diligence and care for their safety after they are discovered upon the track: *Bentley v. Georgia P. R'y Co.*, 86 Ala. 484. Where an accident happens to a traveler at a railroad crossing by reason of a collision with a train, the traveler is presumptively guilty of negligence, but such presumption can be rebutted or repelled by evidence to the contrary: *Hooper v. Boston etc. Railroad*, 81 Me. 260. An engineer is not ordinarily bound to foresee the wrongful presence of persons upon a railroad track, but there may arise cases in which he must be on the lookout for persons on the track, and in such cases the railway company's liability is not limited to a want of care after discovering the danger of the person injured: *Williams v. Kansas City etc. R. R. Co.*, 96 Mo. 275. Compare *Guggenheim v. L. S. etc. R'y Co.*, 66 Mich. 151.

CONTRIBUTORY NEGLIGENCE.—For instances of what has been held to be contributory negligence, see *Virginia etc. R. R. Co. v. White*, 84 Va. 496; 10 Am. St. Rep. 874, and note; *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; *ante*, p. 58, and note. A person who undertakes to walk across a railroad trestle seventy feet long and twenty-five feet high, knowing that a train is due and momentarily expected, and who is injured by the train approaching from the rear, not being seen by the conductor or engineer in time to stop the train, is guilty of proximate contributory negligence, which bars a recovery, in absence of wanton, reckless, or intentional negligence on the part of the railway company: *Bentley v. Georgia P. R'y Co.*, 86 Ala. 484. Compare the recent cases, *Dahlstrom v. St. Louis etc. R'y Co.*, 96 Mo. 99; *Martin v. Stewart*, 73 Wis. 553; *Ecliff v. Wabash etc. R'y Co.*, 64 Mich. 196; *Dougherty v. Missouri P. R'y Co.*, 97 Mo. 647; *Schmidt v. Burlington etc. R'y Co.*, 75 Iowa, 606; *Baltimore etc. R. R. Co. v. State*, 69 Md. 551; *Baltimore etc. R. R. Co. v. Colvin*, 118 Pa. St. 230; *Atchison etc. R. R. Co. v. Wals*, 40 Kan. 433.

HARTMAN v. YOUNG.

[17 OREGON, 150.]

ELECTIONS. — IN DETERMINING CONTESTED ELECTION, EVIDENCE OF BALLOTS ACTUALLY CAST WILL CONTROL that furnished by the official canvass, provided the ballots have been duly preserved, and protected from the reach of any unauthorized intermeddling or tampering. It is a primary rule of elections that the ballots constitute the best evidence of the intention and choice of the voters.

ELECTIONS. — OFFICIAL RETURN OR CANVASS, WHEN DULY CERTIFIED, IS PRIMA FACIE EVIDENCE that the result is as declared, but is never conclusive, unless made so by statute; and as between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the better evidence.

ELECTIONS. — IN ACTION TO CONTEST RIGHT TO OFFICE, BURDEN OF PROOF RESTS UPON PLAINTIFF. He must establish to the satisfaction of the jury or trial court, as the case may be, that the ballots are the genuine ballots cast at the election; otherwise they will receive no credence. Unless it is proved that the ballots are genuine, that is, the identical ballots cast, they should be rejected, and not be permitted to overturn the result as declared by the official count.

ELECTIONS. — STATUTORY PROVISIONS FOR SAFE-KEEPING OF BALLOTS ARE DIRECTORY MERELY, and if the ballots have been safely kept, and protected from any tampering, the chief object of the law is subserved, and the ballots are admissible in evidence, although there may have been some omission to comply strictly with the statutory directions.

ELECTIONS — BALLOTS AS BEST EVIDENCE. — Where the court finds that the ballots were securely and safely kept and preserved, that no one had tampered with them, and that, notwithstanding the box had been opened in the manner and for the purpose stated, the ballots therein were the genuine and identical ballots cast by the voters of South Pendleton precinct, the legal conclusion reached by the trial court upon this state of facts, viz., that such ballots "are the best evidence, and entitled to be recounted," is in conformity with such as the law declares.

D. W. Bailey and W. M. Ramsey, for the respondent.

Richard Williams, J. C. Leisure, and Fred Page Tustin, for the appellants.

LORD, J. This was a proceeding under the provisions of title 4, chapter 14, sections 2544-2548, Oregon Code, to contest the right of the defendant to the office of county clerk of Umatilla County, to which he was declared elected by the board of canvassers of said county.

In substance, the facts alleged impeach the correctness of the returns as certified, in the wrongful and erroneous counting of the votes of South Pendleton precinct, etc., whereby the defendant was declared duly elected, etc.

The answer, after making the usual denials, alleged affirm-

atively and separately that the poll-book of said precinct, signed and attested as required by law, was certified and returned to the plaintiff, then county clerk of said county, showing that an election had been held in that precinct at the date therein stated, giving the number of votes, and that the defendant had received the majority, etc.; that the same was duly canvassed by the board, etc., and that the defendant was duly elected county clerk of said county; that the ballots polled at said election in said precinct were duly enveloped and sealed as required by law, and returned to said county clerk, etc., and that he, being then and there a candidate for the office of county clerk, etc., after he had received the said ballots, enveloped and sealed as aforesaid, did unlawfully break the seal, and remove therefrom the said ballots, etc., and ever since the same have been in the hands of said plaintiff in a loose and unprotected condition, affording an opportunity for changes and alterations of said ballots, and on account of such circumstances the said ballots ought not to be recounted, etc.

The reply put in issue the affirmative matter set up, and the trial proceeded to judgment in favor of the plaintiff.

It thus appears upon the issue made by the pleadings that the subject-matter upon which the contest is based is the recount of the vote of South Pendleton precinct, and which, according to the judgment, if allowable, is conclusive of the right of the parties.

For the determination of the question presented by the record, it perhaps would have been more satisfactory to the court if counsel for the defendant had requested the court below to make its findings fuller in respect to the particular facts upon which such question is raised.

The difficulty, however, seems to have been that he acted upon the hypothesis that the evidence as to the preservation of the ballots of South Pendleton precinct failed or was incompetent to establish their identity as a matter of law, and therefore inadmissible, when the only way, it would seem, the question which he seeks to have litigated and determined can be raised on this record is, Is the judgment and legal conclusion which the trial court draws from the facts found such as the law pronounces?

It will therefore be necessary to state the substance of some of the evidence to show hereafter that it was competent and admissible, and also to show there was evidence tending to

support the findings of the trial court in the particular questioned by this record.

The evidence certified to us in the record discloses that the poll-book, the ballot-box and the ballots therein, of South Pendleton precinct, were duly delivered to the clerk after the election, and the ballot-box, according to the testimony of Mr. Watron, one of the judges of the election, "was sealed over the slit on the top with my name on it, and had two strips of paper around it, both sealed. . . . The box could not be opened without tearing the papers off"; that the contestant, who is county clerk, received the poll-book and ballot-box of said precinct, and the key to the box, on the fifth day of June, and kept the box in the vault in the condition as delivered until the twelfth day of that month, when he took it from the vault and carried it into the main office, where the vote was being canvassed, and in the presence of the other two members of the board, and several other persons who were present and overlooking the canvass, and opened it for the purpose of finding the poll-book, on the assumption that it was locked up in the box, as was the case in some of the other precincts; that he only raised up the ballots, and seeing that the poll-book was not there, immediately returned them into the ballot-box and relocked it, and that soon after he found the poll-book in the vault where he had deposited it when handed to him by Mr. Watron; that the ballot-box and its contents so locked, but not resealed, were returned to the vault, which was made of brick, with iron doors, and which stood open during the day, and that no one had a key to the ballot-box but himself, and that he and his deputy had a key to the vault; that various persons were permitted to go into the vault, such as he knew, and remain one and two hours; that the box remained on the shelf in the vault until called for by this proceeding, undisturbed, and that it had been kept by him safely, and had not been exposed to the public, or been tampered with, and that the box had never been opened, except as stated, or in the possession of any one except himself, and that the contents of the box were the same as when he received it.

Substantially, upon this evidence, the trial court found "that it appeared to the satisfaction of the court, and that affirmatively, on part of the contestant, George A. Hartman, that the said ballots of South Pendleton precinct for Umatilla County have been kept safely by himself, the custodian of the same, as by law provided; that said ballots have not been ex-

posed to the public, or handled by unauthorized persons, and have been identified as the ballots cast by the voters of said South Pendleton precinct on June 5, 1888, and have been preserved intact; that they are genuine, and have not been tampered with; that they have been kept in the vault of the clerk's office of said county and state, locked in the ballot-box of said precinct, since their delivery into the custody of said Hartman, county clerk of said county and state, on June 5, 1888, continuously, until the canvass of the votes on June 12, 1888, when said box was removed into the clerk's office of said county, and for the purpose of finding the poll-book of said precinct, and then and there unlocked in the presence of the board of canvassers, and the ballots therein tied together in one package, as such said package was lifted up and out of said box by said Hartman, and by him at once returned into said box, and the said box was relocked in the presence of said board, and upon the conclusion of said canvass the said box and ballots so locked therein were returned to the said vault by said Hartman, where it and said ballots have remained continuously since said date until removed therefrom on the trial of this action, on July 16, 1888." And as a conclusion from such facts finds "that, as such ballots of said precinct, they are entitled to be admitted as the best evidence and recounted," etc.

From this statement, it becomes apparent why counsel for defendant is anxious to reach the evidence by his exception, and have the court pass on its admissibility as a matter of law, or failing in that, that the court shall regard and treat the proceeding under the statute to contest the election in the nature of a suit in equity so that the court may examine the evidence and try the case *de novo*.

Upon this last proposition, it is sufficient to say that the proceeding under the statute is to be tried as an action at law without the intervention of a jury, and it may be said that in all cases where the object of the action is to determine the right to an elective office, whether under the statute or by an action in the nature of *quo warranto*, the ballots actually cast by the voters are the original evidence of the result of the election.

The remaining question suggested is, that the ballot-box and its contents were not admissible in evidence, for the reason that they have not been properly kept, or so kept as to preclude opportunity for tampering with the ballots.

The contention is, that the facts in evidence so impeach and discredit the genuineness of the ballots admitted by the court and recounted as to destroy their character as the best evidence, and therefore it was admissible to recount them, because the official count as declared, under the circumstances, was the better evidence, and should control in determining the result. It is admitted that in determining a contested election the evidence of the ballots actually cast will control that furnished by the official canvass, provided the ballots have been duly preserved and protected from the reach of any unauthorized intermeddling or tampering.

But it is insisted, unless it is made to affirmatively appear that the ballots have been so carefully kept and protected as to place their identity beyond all reasonable doubt, they ought not to be allowed to overturn the official count. Hence it is earnestly urged that where the evidence in the record discloses that the ballots have not been kept and protected with that vigilant care which the law contemplates, or where they have been so exposed as to afford such opportunity for handling or tampering with them as to cast suspicion on their purity, they lose their character as the best evidence, and are not to be relied on in determining the result of an election, and therefore ought not to be admitted to overturn the official count.

At the outset, it may be said that the official returns or canvass, when duly certified, is *prima facie* evidence that the result is as declared. As against ballots not properly kept, and the identity of which is not shown, such official canvass, although secondary, is the better evidence. But the official canvass, unless made so by statute, is never conclusive. As a *quasi* record, it is entitled to the presumption of regularity and *prima facie* evidence of the integrity of the result of election as declared. But as between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the best evidence.

"It is a primary rule of elections that the ballots constitute the best, the primary evidence of the intention and choice of the voters": *Hudson v. Solomon*, 19 Kan. 177; *Reynolds v. State*, 61 Ind. 423; *McCrary on Elections*, 291, 439; *Cooley on Constitutional Limitations*, 625.

When, therefore, it is shown to the satisfaction of the court that it has before it the identical ballots cast by the voters, as between the ballots themselves and canvass of ballots by the election officers, the ballots are controlling. To show that

they are the genuine ballots cast by the voters, any evidence tending to show that they have been so kept and protected from tampering as to place their identity beyond reasonable doubt is admissible. The burden rests on the plaintiff; he must establish to the satisfaction of the court or jury, as the case may be, that the ballots are the genuine ballots cast at the election; otherwise they will receive no credence. When the ballot-box and the ballots therein of South Pendleton precinct were produced and offered in evidence, if it was shown that they had been properly kept and protected as the law required, they were the best evidence.

On the other hand, if it was shown that they had not been kept or protected with that zealous care which the statute contemplates, or so as to preclude opportunity from intermeddling with them, they are the weakest and most unreliable evidence. But this only goes to the credibility of such evidence, and not to its competency.

Evidence may be extremely weak, and in fact, as against other evidence, entitled to no credit, yet that does not affect its admissibility. The weight to be given to the evidence and its admissibility are diverse matters.

In *People v. Livingston*, 79 N. Y. 288, Church, C. J., said: "Although it must be conceded that the security of the boxes were not made so perfect as to preclude the possibility and even some probability that access might have been had to them for improper purposes, yet I do not think the judge would have been justified in deciding as a matter of law that they had not been preserved inviolate, and in withdrawing the question from the jury."

And again: "The statute requires the ballot-boxes to be preserved undisturbed and inviolate, and it is incumbent on the party offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was on the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediately upon canvassing the votes, and the votes are canvassed at the close of the polls in public, and presumably in the presence of the friends of both parties. . . . After the election, it is known just how many votes are required to change the result. The ballots themselves cannot be identified; they have no earmarks. Everything depends upon keeping the ballot-boxes se-

cure, and the difficulty of doing this for several months, in the face of temptation and opportunity, requires that the utmost scrutiny and care should be observed in receiving the evidence, etc. Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been vigilantly preserved, the ballots are the best and highest evidence; but if not, they are not only the weakest but most dangerous evidence. The jury might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud has been committed."

In the same case, in 13 Hun, the court say: "If the ballots voted at any election are produced on the trial of a cause like this, they are the very best evidence of the result of the election. Of course, the jury must be satisfied of their inviolate preservation; otherwise they will receive no credence; but this does not affect their competency."

Judge Cooley says: "If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all; or if received, that it should be left to the jury to determine upon all the circumstances whether they constitute more reliable evidence than the inspector's certificate, which is usually prepared at the close of the election, and upon an actual count of the ballots as then made by the officers whose duty it is to do so": Cooley on Constitutional Limitations, 625; *People v. Sackett*, 14 Mich. 320; *People v. Cicott*, 16 Id. 283; 97 Am. Dec. 141.

According to their decisions, it is manifest that in a proceeding of this nature the ballots are receivable in evidence for the purpose of controverting the official count and ascertaining the actual result from the vote cast, and that it is for the jury or trial court, as the case may be, to determine from all the facts and circumstances going to show that the ballots have been preserved inviolate, whether they are more reliable than the official count. Of course, the jury must be instructed or the court guided by the principle of law that unless it is proved that the ballots are genuine,—the identical ballots cast,—they should be rejected, and not allowed to overturn the result

as declared by the official count. As a consequence, the ballots and the proof of their identity was competent evidence, and if competent, it was admissible. The credibility and weight to be attached to evidence is usually for the jury or the trial court when it is exercising the jury function, and if it is satisfied from the evidence produced that the ballots have been preserved intact and inviolate, the court, governed by the law which makes them in such case the best evidence, would recount the ballots; otherwise they would receive no credence, and be rejected in determining the result.

It may be admitted that the question is not free from doubt, and apparently there is some conflict in the practice, yet we have reached the conclusion, not without much hesitation, it is true, that there was such a showing as to the safe-keeping of the ballots; that they were competent evidence to go to the trial court to determine as a matter of fact upon all the circumstances whether they had been so kept as to preserve their identity, and to render them more reliable evidence than the official count.

It seems to us, however, the better and more proper way,—especially in proceedings to contest an election under the statute,—to reach the question sought to have decided, is to inquire whether, upon the facts found by the trial court, the conclusion to which it has come, viz., “the ballots are the best evidence, and entitled to be recounted,” is such as the law pronounces. To do this, the findings should have been fuller, and ought to have included the facts that the ballot-box was delivered to its legal custodian sealed; that the poll-book was delivered to him also, and deposited in the vault; that the box was opened for the purpose stated, and relocked and so returned to the vault, and that his deputy and other persons had access to the vault.

Adding these facts to those already found, and which upon suggestion the court would have no doubt included in its findings, would there be error in the conclusion already drawn upon the facts as thus presented by the finding?

The assumption or the argument is, that the box when returned to the vault duly relocked, but not resealed, created such an opportunity for tampering as to invite outrage with almost perfect immunity against discovery; that when opening the box when the poll-book was in the vault was without excuse, and an unlawful act committed by the contestant, whereby he made for himself and his friends an opportunity

to intermeddle with the ballots without detection, and which the law had not given to him, but was designed to prevent, and that such a condition of facts so thus shown by the findings are inconsistent with that safe-keeping which the law contemplates as sufficient to identify the ballots, and authorize them to be recounted.

Counsel says: "When he broke the bond of secrecy which the law had placed around that ballot-box, why did he not then and there, in the presence of other members of the board, reseal it, and in such a way as that its purity could not be questioned?"

The trouble with this argument is, that it is based on the supposition that the law directs and requires the ballot-box to be sealed, when it only requires the ballots to be enveloped and sealed, and deposited with the clerk.

It may be admitted that it was the duty of the plaintiff, as its legal custodian, to safely keep and preserve the box and its contents, and that any act, whether done by himself or others, which disturbed or violated the safeguard which the law had thrown about it, ought, at least, to find its justification in the particular circumstances which rendered such act necessary, and be supplemented by the doing of such things as to place it *in statu quo*, or find its equivalent in the sense of the law for that purpose.

But sealing the box is not one of the safeguards which law has thrown about the ballot. Besides the cases shown, when by acts of omission or commission, through inadvertence or mistake, it sometimes happens that the poll-book is deposited in the ballot-box, or the returns inclosed in the envelope among the ballots, and it becomes necessary to procure them to make the canvass of votes, and the box is opened, or the envelope, as the case may be, such acts or omissions are treated as irregularities, and the provisions of the law in respect thereto as directory only, and will not defeat the ballots as original evidence, provided they are properly accredited and have been safely kept and preserved inviolate. In *Hudson v. Solomon*, 19 Kan. 180, the ballot-box was unlocked for the purpose of taking out the poll-book, and under the facts the court regarded the opportunity for tampering with the ballots, and discrediting them as too slight for serious consideration.

In *O'Gorman v. Richter*, 31 Minn. 29, the ballots were not enveloped and sealed as required by section 88, and for this reason it was claimed that they were inadmissible. But the

court say "that the provisions of this section are merely directory, and that where it is clearly and satisfactorily proved that the ballots have been kept intact and inviolate, in the same condition as when counted by the judges of election, they are admissible in evidence, although not sealed up in envelopes as required by statute"; and further, that the trial court, "being satisfied of the genuineness of these ballots beyond a reasonable doubt, have admitted them"; and that "certainly we, acting as an appellate court, cannot say they erred."

In *Dorey v. Lynn*, 31 Kan. 760, the ballots were wrongfully opened and counted by the city council as a canvassing board, and they remained with the city clerk when they should have been placed in the custody of the county clerk, and yet as "the evidence and findings of the court below show that the ballots in this case were never tampered with in any manner except as already stated," the court say "the ballots were identified beyond all reasonable doubt," and as a consequence entitled to be recounted as the best evidence.

In *Patton v. Florence*, 38 Kan. 501, the poll-book was placed under cover and seal, except that they were inclosed in an envelope or package with the ballots, etc., and the court treated the matter under the facts as an irregularity, and not fatal to the proceeding.

The object of all such provisions is to secure the safe-keeping of the ballots, so that they may be easily identified in case they need to be resorted to in some judicial inquiry; and if they have been safely kept and protected from any tampering, the chief object of the law is subserved, although omissions or irregularities may have occurred, such as we have adverted to.

The ballots are the best evidence of the will and choice of the voters, and if it is shown or the facts find that they have been securely kept and preserved inviolate, they are entitled to be recounted, that the will of the electors may be carried into effect, and allowed to prevail. Nor is there anything in *Kingsly v. Berry*, 90 Ill. 520, relied upon by counsel, inconsistent therewith. The court say: "The ballots may have been tampered with. There is not full proof that they were not. There was a motive for such tampering, at least upon the part of the appellee, if not others engaged with him. The wrong-doers should not be allowed to profit by his violation of the sanctity of the ballot-box. He might do so were there ballots to be received as the identical ones cast by the voters."

But it is to be noted in this case that "the court was not sure that it had before it the identical ballots which were deposited by the voters," and hence applied the rule which the law declares in such case, where, by intermeddling, suspicion is brought on their purity, they are not to be regarded as the best evidence, and entitled to be recounted as against the official canvass.

In *Powell v. Holman*, 50 Ark. 300, the court found that after the vote had been canvassed and abstracted by the clerk as required by law, the ballots were placed for about one week in a library-room adjoining the clerk's office, and that this was an unsafe and exposed place, which afforded opportunity for them to be tampered with, and as a conclusion from these facts finds that the ballots are unworthy of credit as evidence.

In commenting upon this conclusion being such as the law pronounces upon the facts found, the court say: "The authorities are abundant that where ballots have been so exposed as to have afforded opportunity to be tampered with, and have not been guarded with that zealous care which will contravene all suspicion of substitution or change, they lose their presumptive purity, and are no longer to be relied on as evidence in a contest of judicial inquiry as to the result of an election": *McCrary on Elections*, 293; *Cooley on Constitutional Limitations*, 625.

Hence the court say, with reference to the ballots upon the facts found, that the trial court pronounced the judgment of the law when it declared such ballots as unworthy of credit as evidence, and refused to recount them. But there are no facts found in that case, as here, in respect to the safe-keeping of the ballots; they were not zealously cared for, but were so exposed as to afford opportunity for parties or their friends to tamper with the ballots, or add to or take from their number, and as a result, suspicion was brought on their purity and integrity, and the court rejected them as unworthy of credit.

Here the court finds that the box and its contents were securely and safely kept and preserved, that no one had tampered with them, and that, notwithstanding the box had been opened in the manner and for the purpose stated, the ballots therein were the genuine and identical ballots cast by the voters of South Pendleton precinct; and necessarily the conclusion which the trial court reached and finds upon this state of facts, viz., that such ballots "are the best evidence,

and entitled to be recounted," is in conformity with such as the law declares.

In view of the fact that the contestant is the legal custodian of the box and its contents, it no doubt would have been better and more circumspect after the box was opened to have resealed it in the same presence, although there is no such requirement in the statute, and the failure to do so violated no law.

Upon the finding as to the safe preservation of the ballots, we are bound to assume there was satisfactory evidence to support it; or if we looked at the evidence in the record to ascertain whether there was any evidence tending to support such finding, we are confronted with the direct and positive, uncontradicted, and unimpeached testimony of all the sworn officers who have exercised any control over the box and its ballots that it had been safely kept relocked as the law required, and that its contents had not been handled or disturbed.

So that in whatever way the objection raised may be regarded, we discover no error, and must affirm the judgment.

WHEN THE BALLOTS PRODUCED AT AN ELECTION CONTEST ARE AND WHEN THEY ARE NOT TO BE REGARDED AS THE BEST EVIDENCE OF THE VOTE CAST. — An election is for the purpose of ascertaining the will of the electors; and it is well settled that in an election contest the ballots themselves, if they are actually preserved, constitute the highest and best evidence of the will of the electors: *People v. Livingston*, 79 N. Y. 279. The rule is, that in all cases wherein the right to an elective office is the subject-matter of an action, whether in a statutory proceeding to contest an election or in a proceeding in the nature of a *quo warranto*, the ballots cast by the electors at such election, when preserved as the law provides, and properly identified, are the primary and original evidence by means of which the result of such election is to be determined: *Reynolds v. State*, 61 Ind. 392; *Coglan v. Beard*, 67 Cal. 303; *People v. Holden*, 28 Id. 123; *State v. Judge etc.*, 13 Ala. 805; *Dorey v. Lynn*, 31 Kan. 758; *Hudson v. Solomon*, 19 Id. 177; *Dixon v. Orr*, 49 Ark. 238; 4 Am. St. Rep. 42. The paper ballot is to prevail as the highest evidence of the elector's intention: *City of Beardstown v. City of Virginia*, 76 Ill. 34, 48. But it is only when the ballots have been rigorously preserved and kept inviolate that they constitute the best and highest evidence: *People v. Livingston*, *supra*; and it is incumbent upon the party offering the evidence to show that they have been so kept: *Id.*; *Hunnicut v. State*, Sup. Ct. Tex. 1889. It must affirmatively appear that they have been so carefully preserved as to place their identity beyond any reasonable doubt: *Newton v. Newell*, 26 Minn. 529; *O'Gorman v. Richter*, 31 Id. 31. Ballots which have been so exposed as to have afforded opportunity to be tampered with, and which have not been guarded with that jealous care which will contravene all suspicion of substitution or change, lose their presumptive purity, and are no longer to be relied upon as evidence in a contest or judicial inquiry as to the result

of the election: *Powell v. Holman*, 50 Ark. 94; or if received in evidence at all, it should be left to the jury to determine, upon all the circumstances, whether they constitute more reliable evidence than the official count: *People v. Sackett*, 14 Mich. 320; *People v. Cicott*, 16 Id. 283; 97 Am. Dec. 141. Generally speaking, in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with: *Hudson v. Solomon*, 19 Kan. 177. Nevertheless, as held in the principal case, the tendency of the courts is to treat provisions of statute for the safe-keeping of ballots as directory merely. The preservation of the ballots inviolate being the ultimate object of the statute, if that is in fact accomplished, the omission to observe all the formalities to secure that object is not fatal to the evidence. Such omission would weaken the force of the evidence, and induce greater caution in regarding it, but would not necessarily destroy it: *People v. Cook*, 8 N. Y. 67; 59 Am. Dec. 451; *People v. Higgins*, 3 Mich. 233; *O'Gorman v. Richter*, 31 Minn. 25, 29. And where the ballots were imperfectly sealed up, the trial judge charged that there was not the same certainty of their correctness which the law would otherwise have presumed, but submitted it to the jury to determine whether they would rely upon the inspectors' returns or the recount of the ballots; and this was approved by the appellate court: *People v. Cicott*, 16 Mich. 283, 306; 97 Am. Dec. 141. So a provision which requires that after the completion of the canvass, and the return of the ballots to the boxes, the boxes shall be "securely sealed up by the canvassers," contemplates that the boxes shall be so sealed that they cannot be opened without breaking the sealing; and it is not a compliance with the statute, where the inspectors sealed the apertures to the boxes through which the ballots were inserted, and the canvassers did not remove these seals, but delivered the boxes to the police department without further sealing. But the provision as to sealing being directory merely, if it is proved satisfactorily that the boxes had been kept "undisturbed and inviolate," the omission of the canvassers to seal up the boxes, as contemplated, does not render the ballots inadmissible as evidence: *People v. Livingston*, 79 N. Y. 279, and other cases to the same effect cited in the opinion to the principal case; see also *Pradat v. Ramsey*, 47 Wis. 24. But where no steps have been taken for a lawful recount of the ballots cast at any election, and the time has elapsed within which they should have been destroyed as required by the statute, such ballots have no legal existence, and are not admissible in evidence in an action to try the title to an office: *State v. Bate*, 70 Id. 409.

Where the question is for what or for whom a ballot should be counted, the intention of the voter should, if possible, be ascertained, and when ascertained, it must control: *McKinnon v. People*, 110 Ill. 305. And the intentions of voters must be ascertained from their ballots; and if the ballots express such intentions beyond a reasonable doubt, it is sufficient, without regard to technical inaccuracies, or the form adopted by the voter to express his intentions: *Hawes v. Miller*, 56 Iowa, 395; *Brown v. McCollum*, Sup. Ct. Iowa, 1889; *State v. Foster*, 38 Ohio St. 604; *People v. Pease*, 27 N. Y. 84; *State v. Metzger*, 26 Kan. 395; *Clark v. Board of Commissioners*, 33 Id. 202; 52 Am. Rep. 526. If the ballot is found to be perfect, that is, if it expresses a certain intent by the voter, it must be accepted as the exclusive evidence of his intent. Thus if it bears the name of a person who is eligible to the office voted for, it affords the most satisfactory evidence that it was the voter's in-

tention to vote for that person: *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250. And a voter cannot be allowed to say that he voted for one person, when he admits that he cast a ballot, which has not since been changed, showing that he voted for another person: *City of Beardstown v. City of Virginia*, 76 Ill. 49; *Kreitz v. Behrensmeyer*, 125 Id. 141, 177. When, however, it is apparent that the intent of the elector is imperfectly expressed by the ballot, as when the person intended to be voted for is not certainly identified by it, the true rule is to admit extrinsic evidence in aid of such imperfection. Resort may be had in such cases to the circumstances surrounding the election, and the facts of a general public nature connected with it, and these may be considered, in connection with the ballot, in determining what was the intention of the elector: *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250; *Attorney-General v. Ely*, 4 Wis. 420. Thus the office to be filled, the names of the candidates voted for, or the subject contemplated in the proposition submitted to the electors, and the like, may be considered to aid the intentions of the voter: *Hawes v. Miller*, 56 Iowa, 395; *Phelps v. Goldthwait*, 16 Wis. 146; *Cattell v. Lowry*, 45 Iowa, 478; *State v. Gates*, 43 Conn. 533; *State v. Foster*, 38 Ohio St. 604. And it has been held that a voter may be allowed to testify, if he so elects, for whom he intended to vote, as one of the circumstances bearing upon the question of intention: *People v. Pease*, 27 N. Y. 45; and see *Dixon v. Orr*, 49 Ark. 238; 4 Am. St. Rep. 42. But compare *City of Beardstown v. City of Virginia*, 76 Ill. 34, holding that, in the absence of proof of any fraud, the testimony of a voter cannot be received to show his intention in opposition to his ballot: And see *Moffat v. Montgomery*, 68 Mo. 163; *Gilliland v. Schuyler*, 9 Kan. 569. But a ballot which has been changed by a paster to read as a vote for a candidate for a particular office different from the candidate for whom it read as a vote in the condition in which it was when cast, is a forgery, and the same is true when the ballot, after it is cast is destroyed, and another and different ballot is put in its place, and in such case the voter may testify for whom he, in fact, did vote: *Kreitz v. Behrensmeyer*, 125 Ill. 141. And where a patent ambiguity is raised in respect to the name of a candidate upon a ballot, the voter casting the ballot may, if he so elects, be allowed to testify for whom he intended to vote, or what he intended by the ballot: *McKinnon v. People*, 110 Id. 305; and see *Attorney-General v. Ely*, 4 Wis. 420; *Clark v. Robinson*, 88 Ill. 496; *Talkington v. Turner*, 71 Id. 234.

Where a ballot discloses a name written opposite to a printed name erased, it is to be taken as the voter's intention to substitute the written for the erased name: *Fenton v. Scott*, 17 Or. 189; *post*, p. 801. And it was held that a voter's writing a name on a ballot, in connection with the title of an office, is a sufficient designation of the name for that office, although he omits to strike out a name printed on it in connection with the same office. The writing is to prevail as the highest evidence of the voter's intention: *People v. Saxton*, 22 N. Y. 309; 78 Am. Dec. 191; *Brown v. McCollum*, Sup. Ct. Iowa, 1889. See *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349; *Clark v. Board of Commissioners*, 33 Kan. 202; 52 Am. Rep. 526.

ELECTIONS. — FOR THE LAW APPLICABLE TO CONTESTED ELECTION CASES, see the recent cases: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349, and note; *Fenton v. Scott*, 17 Or. 189; *post*, p. 801, and note; *Whitney v. Blackburn*, 17 Or. 564; *post*, p. 857; *De Barry v. Nicholson*, 102 N. C. 465; *ante*, p. 767, and note.

FENTON v. SCOTT.

[17 OREGON, 189.]

ELECTIONS — BURDEN OF PROOF. — IN ACTION TO CONTEST RIGHT TO OFFICE, BURDEN OF PROOF IS ON PLAINTIFF, when he seeks to introduce the ballots to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that they are the identical ballots cast by the voters.

ELECTIONS — BALLOTS AS BEST EVIDENCE. — Ballots, when identified, are the best evidence, and are to prevail over the official count, yet, to entitle them to be resorted to and recounted, the facts going to show their preservation must fix their identity beyond any reasonable doubt. It is required that they be proven intact and genuine with a reasonable degree of certainty, and to the full satisfaction of the court, but this does not require that they must be proved genuine beyond all possible doubt, or beyond a mere possibility that they might have been interfered with.

ELECTIONS — REJECTION OF BALLOTS. — If there has been such negligence in respect to the safe-keeping of ballots as to create reasonable doubts of their integrity, there is a want of that affirmative showing which the law requires to entitle to be recounted and to overturn the official canvass, and the rejection of the ballots by the trial court is not error.

ELECTIONS. — IN ABSENCE OF EVIDENCE ALIUNDE, INTENTION OF VOTER IS TO BE OBTAINED from the face of his ballot; and where a ballot discloses a name written opposite to a printed name erased, the intention of the voter is to be taken to be the substitution of the written for the erased name.

ELECTIONS — ERASURE OF NAMES ON BALLOTS. — Where the face of the ballot showed that the voter had erased the names of two of the candidates for representative, and in proximity thereto, as much as the narrowness of the margin would admit, and almost directly against each of the erased names, had written two other names, one of which was the name of a candidate for county judge on another ticket, but the printed name of the county judge on such ballot was not erased, the facts do not disclose a case where two candidates were voted for for the same office, within the provision of section 2523 of the Oregon Code.

L. Bilyeu and J. J. Walton, for the appellant.

Washburn and Woodcock, and Condon and Dorris, for the respondent.

LORD, J. This was a proceeding under the provisions of title 4, chapter 14, sections 2544-2548, Oregon Code, to contest the right of the defendant to the office of county judge of Lane County, to which he was declared elected by the board of canvassers of said county.

Without adverting to the pleadings, it is sufficient to say the contest proved adverse to the contestant, and it is from the judgment rendered therein that this appeal is brought.

There are but two questions presented by this record, or in

fact earnestly urged by counsel for the contestant, which we shall deem it necessary to consider. One of the main questions—in fact, the main one argued in the brief—which counsel for the contestant seeks to raise is the same question as counsel for the defendant sought to raise in *Hartman v. Young*, 17 Or. 150, *ante*, p. 787, just decided, namely, that the proceeding under the statute to contest an election is in the nature of a suit in equity, and is to be tried by this court *de novo* upon the evidence, or failing in that, that it is the duty of this court to say, as a matter of law, upon the evidence as to their safe preservation, that the ballots were the best evidence, and entitled to be recounted. Both of these questions were decided adversely to this contention in *Hartman v. Young*, *supra*, and we must refer to them, without further argument, for an expression of our views.

But there is no difficulty upon the facts found and presented by this record in having considered the identical question claimed as error and decided.

The findings of the court in this case are stated with a fullness, particularity, and accuracy that is creditable, and in a way that enables this court to determine the correctness of the legal conclusions drawn therefrom. And this is especially so in regard to the facts found as to the care taken of the ballots, and all other matters in relation thereto, so that the correctness of the conclusion drawn by the trial court and questioned by counsel for the contestant is fully presented for our consideration and decision.

In a case like this, the law is well settled that the burden of proof is on the plaintiff when he seeks to introduce the ballots to overturn the official count to show affirmatively that the ballots have not been tampered with, and that they are the identical ballots cast by the voters. The authorities to this point are numerous, and are cited and discussed in *Hartman v. Young*, *supra*, and need not be recalled here. The inquiry now is, Is the legal conclusion which the court below draws upon the facts found such as the law pronounces?

Upon the findings of fact as to the ballots of North Eugene and South Eugene precincts, the trial court declared as a conclusion of law that they were not "sufficiently identified to entitle them to be received in evidence to contradict the official returns," and consequently rejected them. The reason for this, in law, must have been because, under the facts, there was a want of that affirmative showing necessary to establish

the identity of the ballots as the ones actually cast by the voters of those precincts.

Without unnecessarily encumbering the record, the court found as follows: "That the poll-books and sealed packages purporting to be the ballots cast at said election in North Eugene precinct, and the poll-books and a like package purporting to be the ballots cast at said election in South Eugene precinct, were delivered to the clerk of Lane County, Oregon, by one of the judges of the election from each of said precincts some time between June 4, 1888, and June 8, 1888,—the exact date of said delivery does not appear from the evidence in this case; that said package purporting to be the ballots of said precincts were by said clerk deposited in a safe in his office, where they remained until the official canvass of the vote of said county was made, on June 8, 1888, when they were taken from the said safe of the said clerk and deposited in an open pigeon-hole in the vault, where they remained until about two days after this contest was instituted. The said vault is a room adjoining the office of said clerk, in which the public records are kept, and opens into said office, and is accessible to and used by any person who may have occasion to examine the public records of said county, and such persons pass in and out of said vault during office hours whenever they desire so to do; that owing to some defect in the door of the vault it cannot be and was not closed at any time during the time said ballots were so deposited therein; that said clerk or his deputy was generally in said office during office hours, but occasionally for a short time both would be out, and the door of said office not locked; that said packages were taken from the vault by said clerk, and he testified on this trial that he found them in just the same condition as they were when he put them in, and that they have remained in his possession ever since delivered to him, and he did not know of any one handling said ballots but himself, and in his opinion they were in the same condition when offered in evidence on this trial as when delivered to him by the respective judges of said election, and that the said packages, or either of them, had not been opened to his knowledge since they were delivered to him; that said package purporting to be the ballots of North and South Eugene precincts, respectively, were sealed up when offered in evidence in this case, and were each opened by the judge of this court in the presence of the parties hereto, and their counsel, and counted with the result

stated in my twelfth and eleventh findings of fact; that no evidence was offered or given on said trial, showing or tending to show that the package delivered to said clerk, purporting to be ballots of North Eugene precinct cast at said election contained all the ballots so cast, or when said package was sealed up, or by whom, or how long after said election before the same was delivered to the county clerk, or in whose possession or custody the same remained during said time; that the judges of election of South Eugene precinct sealed up or intended to seal up all the ballots cast at said election in said precinct after the count was completed, but there was no evidence offered or given on this trial showing, or tending to show, what time elapsed between the time said ballots were so sealed up, and their delivery to the county clerk, or in whose possession or control the same were during said time, or whether the ballots so sealed up was the same package delivered to the said county clerk."

It will be noted, according to the facts found, that the packages purporting to contain the ballots of each of these precincts were identified by the clerk as the packages delivered to him by one of the judges of each of said precincts; that a part of the time he kept them in his safe in the office, and another part of the time in an open pigeon-hole in the vault; that the vault was not locked, in consequence of some defect in the door, which prevented it from being locked, and that persons who wished to examine the records had access to the vault, but that the packages were in the same condition as when he received them, and were sealed when offered in evidence. Taking these facts as to their safe-keeping and identity, stretching from the time of his receipt of the packages until they were called for by this contestant, there was reasonable certainty that they and their contents had been preserved inviolate; but prior to their delivery to the clerk, and between that and the day when the election took place, there is an hiatus or gap which fails to make that affirmative showing that the law requires must be made to appear to overturn the official count.

While the ballots, when identified, are the best evidence, and are to prevail over the official count, yet to entitle them to be resorted to and recounted, the facts going to show their preservation must fix their identity beyond any reasonable doubt. If there has been such negligence in respect to their safe-keeping as to create reasonable doubts as to their integ-

urity, there is a want of that affirmative showing which the law requires to entitle the votes to be recounted, and overturn the official canvass.

"It is incumbent on the party," said Church, C. J., "offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. . . . It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty": *People v. Livingston*, 79 N. Y. 290.

"All that is required is, that they be proven intact and genuine, with a reasonable degree of certainty, and to the full satisfaction of the court. But this does not require that they must be proved genuine beyond all possible doubt, or beyond a mere possibility that they might have been interfered with. This would be practically to exclude them entirely under any circumstances": *O'Gorman v. Richter*, 31 Minn. 31.

Now, to avoid repetition, it will be sufficient to say, by recurring to the latter part of the findings, as to each of these precincts, there is a want of facts to disclose their identity during the period adverted to. There is no affirmative showing whatever, and we cannot bridge over the chasm by inference or speculation.

From the time when the count of the ballots began on the day of the election, through all their migrations, the ballots should be traced or accounted for, how enveloped, in whose custody deposited, and how kept, with reference to their preservation, until their delivery to the clerk. It may be that the trial court was disposed to draw the line sharply and critically, but to establish the identity of ballots, strictness of proof is required,—so strict as to their safe-keeping as shall exclude all reasonable doubt.

Upon the facts found, we are of the opinion that the law was rightly declared, and the evidence properly rejected.

The next question embodies two objections, and that is, that the conclusions of law as declared in numbers five and seven are not supported or authorized by the findings of fact respectively upon which they are based, namely, the ninth and twentieth findings of facts.

The twentieth finding is thus: "That there was cast in Mohawk precinct at said election one ballot upon which the name Joel Ware, candidate for county clerk, had been erased, and the name J. E. Fenton written in pencil for said office, and

upon which the name Rodney Scott, candidate for county judge, had been erased, and the name L. Bilyeu written in pencil for said office; that there was no candidate by the name of J. E. Fenton for the office of county clerk, and no candidate for the office of county judge by the name of L. Bilyeu; there was no candidate for this office by the name of Fenton at said election for any office except this contestant for the office of county judge; that this ballot was not counted by the judges and clerks of said precinct for contestant for county judge."

Upon this finding the court declared, as a conclusion of law, that "this ballot should not be counted for contestant J. E. Fenton for the office of county judge."

The point presented and claimed to be error can be best shown by exhibiting the ballot:—

For Clerk.

~~JOEL WARE.~~ J. E. FENTON.

For Treasurer.

J. S. LUCKEY.

For County Judge.

~~RODNEY SCOTT.~~ L. BILYEU.

The contestant claims that this ballot should have been counted for him for the office of county judge.

In the absence of evidence *aliunde*, the intention of the voter is to be obtained from the face of his ballot. He has the lawful right to vote for others than those named and printed as candidates for the offices upon the ballots, or to vote for the candidates for other offices than those for which they have been nominated and placed upon the ticket. Nor is there any more decisive way of manifesting that intention than to mark out one name for a certain office designated, and insert in the place thereof, or write directly opposite thereto, the name of some other person.

Looking at the face of this ballot, the voter has by his own deliberate act scratched out the name of Joel Ware, placed upon the ticket as candidate for clerk, and has written in place thereof J. E. Fenton, which we must take to have been his choice for that office, and not for county judge, and consequently there was no error in the law as declared by the court upon the facts stated.

As the next finding over which a contention is raised is long, the point may be more concisely presented by the face of the ballot. In explanation, it is necessary to say that the margin

to write on the ticket was narrow, and not to exceed one half inch in width, and doubtless accounts for writing the names in the slanting manner in which they appear on the ballot:—

Representatives.	{	C. K. HALE.	STAFFORD. R. SCOTT.
		GEO. A. DORRIS.	
		D. R. HARRIS.	

County Judge. J. E. FENTON.

The ticket was counted for the plaintiff Fenton by the judges of the election, but upon the facts as found the court held, by its legal conclusions, erroneously, and that it should be deducted from his vote, and not counted for either party. Scott was candidate for county judge on the other ticket, and the argument is, that as the name of Fenton is not erased, there are two candidates voted for by this ballot for the office of county judge, and that the case brings it within the provision of section 2528 of Oregon Code, that "if the ballot shall be found to contain a greater number of names for any office than the number of persons required to fill that office, it shall be considered fraudulent as to the whole of the names designated to fill such office, but no other."

The face of the ticket shows that the voter had erased the names of two of the candidates for representative, and in proximity thereto, as much as the narrowness of the margin would admit, and almost directly against each of the erased names, had written Scott and Stafford. By the act of erasing Dorris and Harris, we take it, the voter did not intend to vote for either of them, and the proximity, under the circumstances, indicates that it was his intention to supply their places by the names written. This would not only make it a lawful ballot as to all the offices for which there are names on the ticket, but it would fill the vacancies he created by his erasures, by the names put in their place by his own act.

As to Fenton, there is no erasure or other circumstances which indicate that he wished to disturb his ticket as to his name, and we have a right to suppose that he intended to vote for him, unless there is something in his act, or concomitant circumstances, which repel that inference. He put no other name against it, or so near it as to indicate he wished to vote, or did vote, for two persons for that office. To give it that effect, you are compelled to disturb the arrangement as made

by his act, render his ballot fraudulent as to the office of county judge, and deprive him of his vote for a representative for whom he has manifested his choice by his own act, and as he had a right to do.

It is our impression that the case is not one to which that section, *supra*, applies, and that the vote was counted correctly by the judges of the election for Fenton, and that the conclusion which the court declared as to the law upon the facts was error. This is our impression, but, as suggested, it is immaterial, as the error could not affect the result.

The judgment must be affirmed.

ELECTIONS. — WHEN BALLOTS PRODUCED AT AN ELECTION ARE AND WHEN THEY ARE NOT THE BEST EVIDENCE of the vote cast: *Hartman v. Young*, 17 Or. 150; *ante*, p. 787, and extended note to the same.

ELECTIONS. — The burden of proof is upon plaintiff, in a contested election case, to show that the ballots are the genuine ballots cast at the election: *Hartman v. Young*, 17 Or. 150; *ante*, p. 787; *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349, and note 378.

ELECTIONS. — FOR THE LAW APPLICABLE TO CONTESTED ELECTION CASES, compare the recent cases: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349, and note; *Hartman v. Young*, 17 Or. 150; *ante*, p. 787, and note; *De Berry v. Nicholson*, 102 N. C. 465; *ante*, p. 767, and note; *Whitney v. Blackburn*, 17 Or. 564; *post*, p. 857.

FURGESON v. JONES.

[17 OREGON, 204.]

PARENT AND CHILD — ADOPTION — JURISDICTION. — To give decree of county court adopting child any force or effect, such court must have acquired jurisdiction, — 1. Over the persons seeking to adopt the child; 2. Over the child; and 3. Over the parents of such child.

JURISDICTION — PRESUMPTION. — Where it affirmatively appears that adverse party to decree was non-resident of the state at the time the decree was rendered, and the record is silent as to his appearance or notice, there can be no presumption that jurisdiction over his person was acquired by such court.

JURISDICTION — VALIDITY OF JUDGMENT. — It is a rule as old as the law, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination.

JURISDICTION — SPECIAL AND SUMMARY POWERS. — A court of general jurisdiction may have special and summary powers, wholly derived from statute, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction, and in such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction.

ESTOPPELS, TO BE BINDING, must be mutual.

PARENT AND CHILD — ADOPTION. — CHILD BY ADOPTION CANNOT INHERIT from the parent by adoption, unless the act of adoption has been done in strict accord with the statute.

RIGHT OF ADOPTION WAS UNKNOWN TO COMMON LAW, and is repugnant to its principles. Such right being in derogation of common law, is a special power conferred by statute, and the rule is, that such statutes must be strictly construed. The statute must receive a strict interpretation, and every requirement essential to authorize the court to exercise the special power conferred must be strictly complied with.

CONSENT LIES AT FOUNDATION OF STATUTES OF ADOPTION, and when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject-matter without it. Under the Oregon statutes, if the parents are living, and do not belong to the excepted classes, their consent must be obtained, and is a prerequisite to jurisdiction.

DECREE RENDERED WITHOUT JURISDICTION CANNOT BIND OR ESTOP ANY ONE, and may be collaterally assailed, whenever and wherever it may be interposed, in any action.

STRAHAN, J. This is an action of ejectment prosecuted by the plaintiff to recover certain real property situated in the county of Marion.

It appears from the findings that one D. W. Jones was the owner of the real property in controversy at the time of his death, and that he died intestate in said county of Marion; that one Emma G. Charlesworth was his only heir at law, unless the plaintiff was also an heir by virtue of a certain decree of the county court of Marion County, Oregon, by which said court allowed said D. W. Jones and the defendant herein to adopt the plaintiff, if said decree is valid; that prior to the commencement of this action said Emma G. Charlesworth duly conveyed all her interest in said real property to the defendant, who thereby became the owner thereof, unless the plaintiff was entitled to inherit one half thereof by virtue of said decree of adoption; that prior to September 28, 1876, said Emma G. Charlesworth and Sylvester H. Jenner were husband and wife, and the plaintiff was born to them in lawful wedlock, and that on the twentieth day of September, 1876, said parties were by a decree of the district court of the twelfth judicial district in the state of California duly divorced, and the care and custody of the plaintiff was duly awarded to said Emma; that on April 2, 1877, said D. W. Jones and the defendant, his wife, made and signed a certain petition, which was presented to the county court of Marion County, Oregon, as follows:—

"To the Hon. John Peebles, county judge for the county of Marion and state of Oregon:—

"Your petitioners, D. W. Jones and Sarah A. Jones, his wife, of the city of Salem and state of Oregon, respectfully represent to your honorable court that they now have the care and custody of Mary Ellen Jenner, a female child of the age of ten years; that the parents of said child are Sylvester H. Jenner, now residing in San Francisco, California, and Emma G. Jenner, since divorced from said Sylvester H. Jenner and married to George Charlesworth; that in said decree of divorce the care and custody of said child was given to its mother, Emma G. Jenner, now Emma G. Charlesworth; that your petitioners desire to adopt the said Mary Ellen Jenner as their own child, and pray your honorable court for a decree making said child to all legal intents and purposes the child of petitioners, and that the name of said child be changed to Mary Ellen Jones.

(Signed)

"D. W. JONES.

"S. A. JONES."

"STATE OF OREGON, }
COUNTY OF MARION.} ss.

"I, Emma G. Charlesworth, being duly sworn, say that I am the mother of Mary Ellen Jenner mentioned in the foregoing petition of D. W. Jones and wife; that I was divorced from Sylvester H. Jenner at San Francisco, on or about September 1, 1876, and that the court, in granting the divorce, awarded the care and custody of said child to its mother, deponent herein; that I hereby consent to the adoption of said child by said D. W. Jones and wife, and that the name of said child be changed to Mary Ellen Jones.

"EMMA G. CHARLESWORTH.

"Subscribed and sworn to before me this nineteenth day of March, 1877.

[SEAL.]

"SETH R. HAMMER, Notary Public.

"Indorsed:

"Ordered that the within application be granted, and that a decree be entered in accordance with the prayer of this petition and the law in such cases provided.

"April 2, 1877.

J. C. PEEBLES, County Judge.

"Filed April 2, 1877.

"GEORGE A. EDES, County Clerk."

On the same day the following decree or order was entered in said matter by said county court:—

“Now at this day comes D. W. Jones and S. A. Jones, his wife, and present to this court their petition asking leave to adopt Mary Ellen Jenner, who is ten years of age, and to change her name to Mary Ellen Jones, and it satisfactorily appearing to the court that said Mary Ellen Jenner is the daughter of Sylvester H. Jenner and Emma G. Jenner, now Emma G. Charlesworth; that said Emma G. Jenner was divorced from said Sylvester H. Jenner in the state of California, and that Sylvester H. Jenner is still a widower of said state; that in the decree of divorce as aforesaid, the care and custody of said Mary Ellen Jenner was awarded by the court to the mother, the said Emma G. Jenner, now Emma G. Charlesworth; and it further appearing that the written consent of the said Emma G. Jenner, now Emma G. Charlesworth, to the said adoption and change of name has been filed with the petition aforesaid to this court, and that the said D. W. Jones and Sarah A. Jones are of sufficient ability to bring up said child and to furnish her with sufficient care and attention and education, and that it is fit and proper and for the best interests of said child that said adoption should take place, — it is therefore ordered by the court that from and after this date the said Mary Ellen Jenner shall be to all intents and purposes the child of said petitioners, D. W. Jones and Sarah A. Jones, and that the name be changed to that of Mary Ellen Jones.

(Signed)

“JOHN C. PEEBLES, Judge.”

It is further found by the court that the time of presentation of said petition and consent, and the rendition of said decree of adoption, the father of said plaintiff was living, but that no notice whatever was given to him of the filing of said petition or consent, or of said proceedings thereon prior to the rendition of said decree, nor was any appearance for or on behalf of said Jenner ever entered in said county court in said proceeding, or in relation thereto; that about three years after the rendition of said decree, said plaintiff informed her father that she had been adopted by said D. W. Jones and his wife, the defendant herein, and her father approved thereof; that no one has ever appealed from the said decree of said county court; that after said decree was rendered, Jones and the defendant took charge of the plaintiff, and that she lived with them for about six years, and was during said time treated by Jones and wife as their child.

There were also other findings of fact, but they present no question of law for our consideration on this appeal.

The court found as conclusions of law: "1. That the decree of adoption mentioned in and set out in my sixth finding of fact was and is binding and conclusive upon Emma G. Charlesworth, and upon Sarah A. Jones, her successor in interest; 2. That the plaintiff is the owner and entitled to the possession of one undivided one half (subject to the defendant's dower interest therein) of the real property described in her complaint; 3. That the plaintiff is entitled to a judgment for the possession of said real property, and for one dollar damages, and for her costs and disbursements." From this judgment the defendant has appealed to this court.

1. The sole question to be determined is the validity of the decree of the county court of Marion County, allowing D. W. Jones and wife, the present defendants, to adopt the plaintiff as their child. If that decree is valid, then the judgment of the court below is right and ought to be affirmed; if otherwise, it must be reversed.

The act of adopting a child is not of common-law origin, but was taken from the civil law and introduced here by statute. The provisions on the subject, as found in several sections of Hill's Code, section 2937, provide who may adopt a child, residence of parties, and who must join in the petition, and in what court the petition is to be presented. Section 2938 says: "The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption. If neither parent is living, the guardian of the child, or if there is no guardian, the next of kin in this state, may give such consent; or if there is no next of kin, the court may appoint some suitable person to act in the proceedings as next friend of the child, and to give or withhold such consent."

By section 2939 the court is authorized to proceed as if a parent were dead, if such parent is insane, imprisoned in the state prison under a sentence for a term not less than three years, or has willfully deserted and neglected to provide proper care and maintenance for the child for one year next preceding the time of filing the petition.

Section 2940 provides where a parent does not give consent to the adoption of a child, he is to be personally served with a copy of the petition and order thereon, if found in the state; if not, said petition is to be published once a week for three successive weeks in such newspaper printed in the county as

the court directs, the last publication to be at least four weeks before the time appointed for the hearing.

Section 2941 requires the consent of the child to such adoption, if he is of the age of fourteen years or upwards.

Section 2942 defines the duty of the court upon the hearing, and what facts must be made to appear, and the substance of the order to be made.

Section 2943 defines the effect of such adoption as to relationship and inheritance, and section 2944 deprives the parents of such child of all legal rights as respects the child, and frees him from all obligation of maintenance and obedience as respects his parents.

The question thus presented for our determination is a very important one, and lies in narrow limits. Its correct solution depends upon the single question whether or not the county court of Marion County, at the time it made the decree authorizing Jones and wife to adopt the plaintiff, had acquired the requisite jurisdiction over the parties for that purpose. To give its decree any force or effect, jurisdiction must have been acquired by the court,— 1. Over the persons seeking to adopt the child; 2. Over the child; and 3. Over the parents of the child.

It may be assumed, I think, that enough is shown to give said court jurisdiction under subdivisions 1 and 2, and over Mrs. Emma G. Charlesworth, the mother of the child.

The sole question to be examined therefore is, whether enough is shown to give said court jurisdiction over the person of Sylvester H. Jenner, the child's father. But before proceeding to the consideration of this question, it may be well to advert to the principles of law to be applied in the determination of the question of jurisdiction. And in the examination of this question, we assume, for the purposes of this case, but without deciding it, that under the constitution and laws of this state, county courts, in the exercise of the powers conferred by this statute, are to be regarded as courts of general jurisdiction.

It appears that at the time the petition was presented to the county court, Sylvester H. Jenner was a non-resident of this state. In such case, and the record is silent, there can be no presumption that jurisdiction over his person was acquired.

Mr. Justice Field, in *Galpin v. Page*, 18 Wall. 850, states the rule applicable in such case: "Whenever, therefore, it

appears, from the inspection of the record of a court of general jurisdiction, that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

Further: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In the same case, and speaking more directly to the point now under consideration, the court quoted with approbation a decision of the supreme court of New Hampshire, — *Morse v. Presby*, 25 N. H. 382, — to the effect that a court of general jurisdiction may have special and summary powers, wholly derived from statutes not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. And after some other observations, the court adds: "But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court."

The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. This doctrine was fully approved by this court in *Northcutt v. Lemery*, 8 Or. 317, which renders its further discussion unnecessary.

Applying these tests to the record before us, and it is mani-

fest that the court had no jurisdiction whatever over Sylvester H. Jenner at the time it rendered said decree of adoption. He was not served with notice, and did not appear, and therefore the court was utterly without jurisdiction to render any decree or make any order which could in any manner affect his rights.

2. But counsel for plaintiff argue that this defendant is in no condition to make the objections of want of jurisdiction; that she consented to the act of adoption, and that she is bound by it. If this is so, it must be on the ground of estoppel. But estoppels to be binding must be mutual, and if Sylvester H. Jenner, who was a necessary party to this proceeding, was not bound by the decree, it is not perceived on what ground the same could be held binding on any of the other parties.

But waiving this objection, I think the findings show that the attempted adoption was never consummated, because the statute under which the proceedings were had was never complied with. The statute requires the consent in writing of the parents, unless they are brought within its exceptions. Here only one parent consented, and there was no attempt made to bring him within the exceptions contained in the statute, and the petition was not served upon him. A question closely akin to this in principle came before the supreme court of Iowa, in *Tyle v. Reynolds*, 53 Iowa, 146, and the court said: "Therefore, a child by adoption cannot inherit from the parent by adoption unless the act of adoption has been done in strict accord with the statute. The statutory conditions and terms are, that the written instrument must be executed, signed, and acknowledged, and filed for record; when this is done the act is complete. If the named requisites are not done, then the act is not complete, and the child cannot inherit from the parent by adoption. The filing for record is just as important in a statutory sense as the execution or acknowledgment. One may be dispensed with as well as the other, for the right depends solely upon the statute. There is no room for construction, unless we eliminate words from the written law, and this we are not authorized to do." *Long v. Hewitt*, 44 Iowa, 262, and *Keegan v. Geraghty*, 101 Ill. 26, lay down, in effect, the same principle.

In the state of New Jersey, a statute is in force very similar to ours, which came before the prerogative court of that state, and received a construction in *Luppie v. Winans*, 87

N. J. Eq. 245. In that case the court said: "The child was under fourteen years of age, and the court, as appears by the opinion, construed the statute as requiring no consent, either on part of parent or child, to the adoption in such case, but held that in such cases the statute confides the whole matter to the discretion of the orphans' court without regard to the wishes of either parent or child. This construction is entirely inadmissible. It would make the law liable to be the instrument of the forcible transfer of one man's child to another person in spite of the parent's opposition, provided the court deems it advantageous for the child that the transfer be made. The law expressly gives to the decree of adoption the effect of severing absolutely the legal ties between the parent and the child, and putting an end to their reciprocal relation. It declares that from the date of the decree, the rights, duties, and privileges and relations between the child and the parent, except the right of inheritance, are severed, and transforms them all. . . . A just, and it seems to me an obvious and necessary, construction of our statute of adoption is, that if the child be under fourteen, there need be no consent on its part, but the consent of the parent or parents, if there be any living, provided they be known, and not hopelessly intemperate or insane, and have not abandoned the child, must be obtained."

The same view seems to prevail in Pennsylvania under the statute of that state. The only case cited upon the argument from that state is *Booth v. Van Allan*, 7 Phila. 401; *Hurley v. O'Sullivan*, 137 Mass. 84. The court, in passing upon the effect and construction of the statute, said: "But there is one other objection which we think is fatal. The act of May 4, 1855, empowers the court to make a decree of adoption with the consent of the parents or surviving parent, or if there be none, of the next friend of an infant. The strict legal signification of the term 'parents' is the lawful father and mother of a child; but it may be questioned whether it does not mean more than this in the act of 1855,—whether the words ought not rather be taken to mean those who stand in the relation of father and mother to the infant. If this be the correct view, then the proceedings for leave to adopt the infant as hers are void for want of consent of parents. New Hampshire has a statute similar to ours, which came before the supreme court of Massachusetts in *Foster v. Waterman*, 124 Mass. 592. A child of persons resident in the state of Massachusetts had

been adopted in the state of New Hampshire, and the validity of said adoption was the question to be decided, and the court held that such a statute is not to be presumed to extend to a case in which the domicile of those petitioning for leave to adopt a child is in another state; the provision in the statute of New Hampshire, that the decree may be made in the county where the petitioner of the child resides, implies that the statute is intended to be limited to cases in which all parties have their domicile in that state."

3. It was claimed, however, that the adoption was complete as to the defendant and the other persons who were in fact parties to the record. This construction was pressed upon the supreme court of Iowa in *Shearer v. Weaver*, 56 Iowa, 578, and rejected, the court saying: "Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way."

From these citations, and the plain import of the statute itself, it is manifest that the attempted adoption of the plaintiff by Jones and wife was never consummated, and that the plaintiff never acquired any rights to inherit Jones's property by reason of the facts found by the court.

The proceedings were fatally defective because the father of the child did not consent to the adoption, nor was any notice of the application for such adoption served upon him, nor did he appear; and being a non-resident of the state, I am inclined to the opinion the statute did not apply to him. However that may be, the proceedings were fatally defective on the other grounds.

The court's second conclusion of law was therefore not justified by the facts found, and for that reason the judgment must be reversed, and the cause remanded to the court below.

The other case between the same parties and submitted with this one, and involving the same questions, must also be reversed and remanded.

The conclusions reached render it unnecessary to order a new trial, because in no possible view of the facts would the plaintiff be entitled to recover.

The following response was filed to a petition for a rehearing:—

LORD, J. In this motion for rehearing the argument of counsel amounts to this: that the absence of consent of one of

the parents, or to give the notice as prescribed by the statute if not found in the state, only renders the proceeding and decree of adoption voidable, but not void, and unless corrected on appeal, such decree cannot be collaterally assailed. This contention is necessarily based on the idea that the consent of both parents, if living and not belonging to the excepted classes, or notice as prescribed and already adverted to, is not a prerequisite to jurisdiction; that it is sufficient if the consent of one of the parents be obtained, and that the other parties, viz., the child and petitioning parents, are present and consenting to the proceeding for jurisdiction to attach, and thus to authorize the court to judicially act.

If this position be tenable, the decree of adoption is not void, and cannot be collaterally attacked, for it is elementary law that after jurisdiction has attached, although errors may occur in the exercise of such jurisdiction, the judgment rendered in such case is beyond the reach of collateral inquiry.

On the other hand, if the consent of both parents, or the consent of one and notice to the other as prescribed, whether in or out of the state, as the case may be, is necessary, and must precede the right or power of the court to act judicially, all other parties being present and consenting, such unity of consent, so to speak, is a prerequisite to jurisdiction, and a decree not founded upon it would be a mere nullity, binding no one, and subject to be so declared in a collateral action.

Our inquiry, then, is reduced to this: What are the requirements of our statute essential to confer jurisdiction upon the facts as presented in this record? It will assist us some in determining this question to ascertain the nature of the power conferred and the rule of construction in such case to be applied to the statute.

The permanent transfer of the natural rights of a parent was against the policy of the common law. The right of adoption, as conferred by this statute, was unknown to it, and repugnant to its principles. Such right was of civil-law origin, and derived its sanction from its code. The right of adoption, then, being in derogation of common law, is a special power conferred by statute, and the rule is, that such statutes must be strictly construed: *Brown v. Basey*, 3 Dall. 365; *Dwarris on Statutes*, 257. This being so, the statute must receive a strict interpretation, and every requirement essential to authorize the court to exercise the special power conferred must be strictly complied with.

The statute provides that the parents of the child, except as therein provided, shall consent in writing to such adoption, but further provides, that if a parent does not consent to the adoption of his child, the court shall order a copy of the petition and order therein to be served on him personally, if found in the state, and if not, by publication as therein provided.

As the facts do not involve the excepted classes, the provisions of the statute in that regard are omitted. The object of such service, whether actual or constructive, when it has reference to those cases which require the written consent, and such written consent is not given, is to notify the party of the hearing, in order to ascertain whether his consent may be obtained, or will be given, so that the court may have the requisite authority to make the decree of adoption. If he appears and refuses to give such consent, there is then wanting what the statute specially names as essential to authorize the court to make a decree, or judicially act in the premises. The reason is, that consent lies at the foundation of statutes of adoption, and when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject-matter without it.

"The consent of the natural parents," says one writer, "and of the child, if of sufficient understanding, are, except in cases where the parents have deserted their child, or are confined in prison, as a rule, indispensable": 8 Cent. L. J. 898.

Says another writer, in annotating a case, the "adoption, except where it consists merely in declaring the person adopted an heir of the adopter, must be founded on consent. All the statutes require the written, and generally the recorded, consent of the adopting parent or parents, and of the parents, parent, guardian, next of kin, or next friend of the minor appointed by the court, in most states the consent of the minor, if over fourteen, and finally the consent of the court": 14 L. L. R. 682.

And it is further remarked that the case annotated is valuable as an illustration of the strict construction that ought to be applied in deciding questions arising under statutes of adoption.

In *Luppie v. Winans*, 37 N. J. Eq. 245, the court say: "A just, and it seems to me an obvious and necessary, construction of our statute of adoption is, that if the child be under fourteen there need be no consent on its part, but the consent

of the parent or parents, if there be any living, provided they be known and not hopelessly intemperate or insane and have not abandoned the child, must be obtained."

It is thus apparent that if the parents are living and do not belong to the excepted classes, that their consent must be obtained, and is a prerequisite to jurisdiction; that without such consent jurisdiction does not attach, and the court is without authority to act and make a decree of adoption, and if it undertakes to do so, its decree will be a nullity, not voidable but void, and may be collaterally assailed in any action.

Now, by this record the admitted facts are, that the father of the plaintiff did not belong to the excepted classes, that he did not give his written consent, and that no notice in any form was given or attempted to be given him.

In such case the statute is explicit, and requires the consent of the parents in writing to sanction the authority of the court before it can make a decree of adoption; certainly, it could not proceed without notice at least, assuming that notice may be given in such cases, and a failure to appear would be equivalent to consent.

But in this case the contention is, that the court could exercise its jurisdiction without such consent, and that its decree would only be avoidable, and that those appearing, it not having been corrected upon appeal, would be estopped by it. The vice of this argument lies in assuming that jurisdiction attached, and the court was authorized to make a decree of adoption without the consent which the statute prescribes as essential upon the facts as presented by this record.

There is a marked distinction between jurisdiction and the exercise of jurisdiction. When jurisdiction has attached, all that follows is but the exercise of jurisdiction, but jurisdiction does not attach until the conditions upon which it depends are fulfilled.

In this case, the jurisdictional facts are the consent of the parents, not one of them, but both, as the statute requires, and the absence of it is fatal to the validity of the decree. Hence such a decree cannot bind or estop any one, and may be collaterally assailed, whenever and wherever it may be interposed in any action.

The motion is overruled.

ADOPTION, RIGHTS AND DISABILITIES OF ADOPTED CHILDREN. — The law on this subject, as adjudicated in recent cases, is to be found in *Lawson's*

Rights and Remedies, sec. 809; see also *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146.

ESTOPPELS MUST BE RECIPROCAL and mutual, and bind both parties: *Cecil v. Cecil*, 19 Md. 72; 81 Am. Dec. 626; *Mills v. Graves*, 38 Ill. 455; 87 Am. Dec. 314; *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577; *Alexander v. Walker*, 8 Gill, 239; 60 Am. Dec. 688; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51.

JUDGMENTS RENDERED WITHOUT JURISDICTION are void: *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626; *McEwan v. Zimmer*, 38 Mich. 765; 31 Am. Rep. 332; *Gilchrist v. West Virginia etc. Co.*, 21 W. Va. 115; 45 Am. Rep. 555; *Butcher v. Bank of Brownsville*, 2 Kan. 70; 83 Am. Dec. 446; *Williamson's Case*, 26 Pa. St. 9; 67 Am. Dec. 374; *Wilcoxon v. Burton*, 27 Cal. 228; 87 Am. Dec. 66; *Kenney v. Grier*, 13 Ill. 432; 54 Am. Dec. 439; *Rodgers v. Evans*, 8 Ga. 143; 52 Am. Dec. 390; *Brickhouse v. Sutton*, 99 N. C. 103; 6 Am. St. Rep. 497; *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836; *Landon v. Townshend*, 112 N. Y. 93; 8 Am. St. Rep. 712; *Dorr v. Rohr*, 82 Va. 359; 3 Am. St. Rep. 106; *Horan v. Wahrenberger*, 9 Tex. 313; 58 Am. Dec. 145; *Lovejoy v. Albee*, 33 Me. 414; 54 Am. Dec. 630; *Swiggart v. Harber*, 4 Scam. 364; 39 Am. Dec. 418; *Horner v. State Bank*, 1 Ind. 130; 48 Am. Dec. 355; *Pelton v. Platner*, 13 Ohio, 209; 42 Am. Dec. 197; *Shaffer v. Gates*, 2 B. Mon. 253; 38 Am. Dec. 164; *Flint River S. Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Flint River S. Co. v. Roberts*, 2 Fla. 102; 48 Am. Dec. 178; *Jones v. Commercial Bank*, 5 How. 43; 35 Am. Dec. 419; *Keaton v. Banks*, 10 Ired. 381; 51 Am. Dec. 393; *Williams v. Preston*, 3 J. J. Marsh. 600; 20 Am. Dec. 179; *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447; *Allen v. Huntington*, 2 Aiken, 249; 16 Am. Dec. 702; *Reading v. Price*, 3 J. J. Marsh. 61; 19 Am. Dec. 162; *Plano Mfg. Co. v. Rasey*, 69 Wis. 246; and such judgments may be attacked even on collateral proceedings: *Reynolds v. Stockton*, 46 N. J. L. 211; 3 Am. St. Rep. 305; *Chicago etc. Ry Co. v. Summers*, 113 Ind. 10; 3 Am. St. Rep. 616; *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527, and note; *Rahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742, and note 762-770; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note 453-455; *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74; *Ferguson v. Crawford*, 70 N. Y. 253; 26 Am. Rep. 589. But judgments cannot be collaterally attacked for mere errors or irregularities which render such judgments not void, but only voidable: *Postlewaite v. Ghiselin*, 97 Mo. 420; *Harmon v. Moore*, 112 Ind. 221; *Brittain v. Mull*, 99 N. C. 483; *Adams v. White*, 23 Fla. 352; *State v. McClellan*, 87 Tenn. 52; *Tyson v. Belcher*, 102 N. C. 112; *Board of Commissioners of Marion County v. Welch*, 40 Kan. 767; *Déjan v. Schaffer*, 40 La. Ann. 437; *Tierney v. Barr*, 75 Iowa, 758; *Sharp v. Elliott*, 70 Tex. 666; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; 7 Am. St. Rep. 129, and cases in note 137.

JURISDICTION — WHAT IS. — Jurisdiction, as applicable to a state, is the authority to declare and the power to enforce the law, as well as the territory within which such authority and power may be exercised, and the jurisdiction of a state is coextensive with its sovereignty: *Sanders v. St. Louis etc. Anchor Line*, 97 Mo. 26. Jurisdiction, as applicable to a court, is the power to hear and determine the particular case involved; and if this power does not exist, there is no jurisdiction in the case; but if this power does exist, then, to confer actual jurisdiction in the particular case, the jurisdictional power of the court must be invoked by such proceedings as are requisite under the local law of the particular tribunal: *Bassick Mining Co. v. Schoolfield*, 10 Col. 46. To render a judgment binding, the court must have jurisdiction

over the parties as well as over the subject-matter; and jurisdiction of courts of general powers will be presumed until the contrary is shown, but jurisdiction of courts of limited powers must affirmatively appear; still, it must be kept well in mind that courts of general jurisdiction stand upon the same footing as courts of limited or special jurisdiction, when not acting within the scope of their general powers, but under special statutory powers: *Richardson v. Seevera*, 84 Va. 259. And where no jurisdiction exists in a court, in point of law, to hear and determine a cause, the consent of the parties will not confer jurisdiction: *Applegate v. Dowell*, 15 Or. 513; *McNeill v. Hodges*, 99 N. C. 243.

JURISDICTION — PRESUMPTION AS TO. — The circuit court is presumed to have jurisdiction of causes which it assumes to try, and the want of jurisdiction is a matter of defense: *Board of Commissioners v. Leggett*, 115 Ind. 544; *Ridling v. Stewart*, 77 Ga. 539; *Marks v. Matthews*, 50 Ark. 338. Circuit court is one of general jurisdiction, and nothing will be intended to be out of its jurisdiction but what specially appears to be so: *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74, and note 79.

JURISDICTION — VALIDITY OF JUDGMENT. — No person can be affected by a judicial decree unless he or she is a party thereto, either individually or by representation: *Landon v. Townsend*, 112 N. Y. 93; 8 Am. St. Rep. 712, and note 716.

PATTERSON v. HAYDEN.

[17 OREGON, 228.]

SEDUCTION — DEFINITION. — The word "seduction," in its application to the conduct of a man toward a woman, means the use of some influence, promise, arts, or means on his part, by which he induces the woman to surrender her chastity and virtue to his embraces. A woman cannot be said to be "seduced," who, at the time of the alleged seduction, was leading a lewd and lascivious life.

SEDUCTION — AFTER REFORMATION. — A woman may be guilty of unchastity, and then reform and lead a virtuous life, and if then seduced, her seduction ought to be visited with such damages as a jury would think, in view of all the facts and circumstances, the defendant ought to pay; but to justify a recovery there must be a reformation.

EVIDENCE — PROVINCE OF JURY. — It is right of jury, and not of the court, to determine the effect of evidence, unless in particular cases where its effect is declared by law.

G. H. Burnett and E. A. Downing, for the respondent.

N. B. Knight, and McCain and Hurley, for the appellant.

STRAHAN, J. This is an action brought by the plaintiff against the defendant to recover damages for the seduction of his minor daughter. The plaintiff had judgment in the court below for the sum of \$3,633, from which the defendant has appealed to this court. The only questions presented for our consideration on this appeal are the alleged errors of the court in

giving and refusing instructions. The appellant's counsel excepted severally to one instruction given by the court, and to its refusal to give those asked on behalf of the defendant.

The defendant gave evidence tending to prove that for a long time prior to the alleged seduction, and continuing up to that event, the plaintiff's daughter resided with her parents in the city of Salem; that she was in the habit of meeting several young men of her acquaintance, including the defendant, out in the streets and avenues of the city in the night-time, and alone; that these meetings were as late as nine and ten o'clock, or later; that on these occasions the parties did not go to the house of plaintiff's parents for her, but that she came out to meet them.

The testimony of Stella Patterson tended to prove that the first sexual intercourse between herself and the defendant took place on the 4th of July, and according to Dr. Holmes's evidence, when Stella applied to him for treatment in the month of August following she was afflicted with chronic gonorrhea.

The charges excepted to and two of the requests are so closely connected that they will be considered together. The portion of the charge excepted to constitutes a part only of an entire sentence in the charge of the court. The complete sentence is as follows: "Evidence of prior unchastity of the plaintiff's daughter is competent both to show that the sexual intercourse was without enticement, artifice, persuasion, or solicitation which overcame her reluctance and scruples, and also in mitigation of damages." And then comes the part excepted to: "But proof of former unchastity is of itself not a defense or bar to any action of this kind."

The following are two of the defendant's requests to charge:—

"1. Before you can find a verdict for the defendant in this case, you must first find from the evidence that the plaintiff's daughter was at and prior to the alleged seduction a chaste female, and that the defendant seduced her, and had illegal sexual intercourse with her."

"5. Proof that the defendant and plaintiff's daughter had illicit sexual intercourse with each other does not of itself show that the plaintiff's daughter was seduced by the defendant; but before you can find such seduction, you must first find from the evidence that the plaintiff's daughter was chaste, and that she was overcome by the defendant by the use of some artifice or promise, which by reason of her relations with

and confidence in the defendant she, although a moral and chaste female, could not resist."

1. Under the particular facts disclosed by this record, that part of the charge of the court which was excepted to had a tendency to mislead the jury. They might have well understood from that language that no difference to what extent or how often the plaintiff's daughter may have engaged in acts of lewdness and lasciviousness with miscellaneous men, and continuing up to the very event complained of, still her seduction by the defendant was possible, and the jury could only consider such acts in mitigation or to corroborate the defendant's denial. This, I think, for reasons presently to be noticed, was going too far. There is no doubt that a woman may be guilty of unchastity, and then reform and lead a virtuous life. In such case, her seduction ought to be visited with such damages as a jury would think, in view of all the facts and circumstances, the defendant ought to pay; but to justify a recovery there must be a reformation. In other words, the female must have honestly abandoned and ceased her lewd conduct for a sufficient length of time before the act complained of, as to induce the jury, as reasonable men, to believe the reformation was real, and not feigned. If the court had added to the charge a proviso to the effect that for a reasonable time before the alleged seduction the plaintiff's daughter had abandoned and ceased her unchastity, if she had been unchaste, so as to satisfy the jury, at the time of the alleged seduction, she was leading a virtuous life, such instruction would have left the jury free to have instituted the necessary inquiry on that subject.

2. By the two requests which were refused, counsel for appellant seek to present the question whether or not a woman who is without virtue and unchaste can be the subject of seduction within the meaning of the code. The action for the injury and wrong done to a father, mother, or guardian by the seduction of a daughter or ward is given by Hill's Code, section 35, as follows:—

"Sec. 35. A father, or in case of death or desertion of his family, the mother, may maintain an action as plaintiff for the seduction of a daughter, and the guardian for the seduction of a ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service."

This section has entirely changed the character of the

action. Under the law as it stood formerly, loss of service was the gist of the action, without which it could not be sustained. The value of the services rendered was immaterial, but some service, or a legal duty to render the same, must have been alleged and proven, and then the jury was directed to assess damages for the loss of such service as well as for the dishonor brought upon the plaintiff's family by reason of the seduction of his daughter, etc.; but the damages in fact were assessed for the seduction.

This anomalous state of the law was sought to be remedied by the section above quoted, so that there need be now no loss of service by the parent or guardian, or liability to render service by the daughter or ward. Special damages, such as expenses incurred for medical treatment and the like, are still recoverable, but they must be specially alleged in the complaint.

But the question which presents the greatest difficulty is, What is meant by the word "seduction" in this section? Lexicographers are not agreed as to its meaning. Webster defines the word "seduce": "To draw aside from the path of rectitude and duty in a manner; to entice to evil; to lead astray; to tempt and lead to iniquity; to corrupt; to deprave; to induce to surrender chastity." And the word "seduction" thus: "The act of seducing or of enticing from the path of duty; specifically, the act or crime of persuading a female to surrender her chastity." Burrill's Law Dictionary thus defines it: "The debauching of a woman; the offense of inducing a woman to consent to unlawful intercourse,"—omitting altogether the elements of chastity.

Under Webster's definition, the female must have been persuaded to surrender her chastity; under Burrill's, only to consent to unlawful intercourse.

Courts have been more inclined to follow Webster's definition than those given by the legal lexicographers.

In *Croghan v. State*, 22 Wis. 444, the word "seduction" is thus defined: "The word 'seduction,' when applied to the conduct of a man toward a female, is generally understood to mean the use of some influence, promise, arts, or means on his part by which he induces the woman to surrender her chastity and virtue to his embraces."

So this court in *Parker v. Monteith*, 7 Or. 277, approved of the following definition of "seduction": "A promise of marriage by the defendant to Flora Parker, or any influence

exerted by him over her, such as gaining her affections, or acquiring influence over her, or persuading her, which had a tendency to draw her from the path of virtue, would be sufficient, if followed by illicit intercourse, to constitute seduction, if the jury believe that she was thereby constrained to yield to his desire."

And this court in *Breon v. Henkle*, 14 Or. 494, construing section 36, Hill's Code, which gives a right of action to a female who is unmarried and over twenty-one years of age, and who has been seduced, said: "The section of the statute which gives the right of action only provides that the plaintiff may recover such damages as may be assessed in her favor. I suppose this should be construed to mean legitimate damages, and the case being *sui generis*, it leaves a wide scope for construction. If the section intends that such woman in any case of illicit sexual intercourse resulting in pregnancy can maintain an action against her paramour, the recovery should be confined to the actual pecuniary loss sustained. Such a rule would not be unjust to the man in any case. It would only be a fair apportionment of a burden arising from a mutual wrong. If, however, it is intended to include in all cases the loss of character and reputation of the woman, and the damages be estimated by a jury of men, it would operate oppressively and perniciously. It would tend to the demoralization of the female sex; would be a reward for unchastity, which a class of adventuresses would be swift to profit by. If, on the other hand, the said section intends to enable an unfortunate woman, whose love and confidence have been gained, and her consent to the sexual intercourse been secured through hypocrisy and artifice, to maintain an action for compensation in damages, she should not only recover for the pecuniary loss suffered, but also on account of her mental anguish and loss of reputation and character. If such construction of the section of the statute in question is, however, to obtain, there should be something more than a mere 'reluctance' upon her part to commit the act. It should be a reluctance that enticements and persuasions could not overcome without the presence of some other potent influence; such a state of facts should be proved as would convince a fair-minded person that she had been deceived and deluded, and that her submission was in consequence of such deception and delusion. To term coaxing and persuasion of a woman to yield to the lecherous embraces of a man 'a seduction by artifice' would be a misno-

mer; a virtuous-minded woman would promptly spurn such approaches with indignation. And if the statute is to receive the construction last indicated,—if a woman of mature years is allowed to recover damages for the loss of reputation and character in consequence of having permitted a man to have carnal knowledge of her,—she should be required to show that she had been prudent; had exercised at least ordinary discretion; had sacrificed her virtue through an influence that was calculated to lead astray an honest-minded female. An action for obtaining property fraudulently cannot be maintained without proof of facts calculated to deceive a person of ordinary prudence; and how can a female a long way beyond girlhood claim to have been defrauded of that which every womanly instinct of her nature prompts her to set the highest value upon, by ‘flattery, false promises, artifice, urgent importunity, based upon professions of attachment,’ unless they are of such a character as are calculated to mislead an ordinarily prudent and virtuous-minded woman”: *Bell v. Rinker*, 29 Ind. 267.

So far, those extracts, I think, tend to show that, in construing the statute under consideration, to constitute seduction, something more is necessary than sexual intercourse, induced by persuasions, urgent importunities, etc., followed by pregnancy; but just where the dividing line is to be drawn seems difficult. If the word “chaste,” in this connection, is used in the sense of never having submitted to illicit sexual intercourse, the requirement is greater than the law exacts; because it has been frequently determined that a woman may be seduced who had previously at some period of her life been unchaste.

Baird v. Bochner, 72 Iowa, 318, is a case where the plaintiff had formed an illicit connection with the defendant, which continued for some time, and then the plaintiff concluded she would reform, and for that purpose went from the state of Iowa to Kansas, where she remained about one year, and then returned to Iowa, where the alleged seduction took place. The evidence tended to show that during her absence she led a virtuous life, but upon her return to Iowa, she again submitted to the defendant; and the court held, for the purposes of the opinion, that she was of chaste character after her return from Kansas, but the plaintiff failed on other grounds.

So in *Smith v. Milburn*, 17 Iowa, 30, it appeared that the plaintiff, who was suing for her own seduction, but had

reformed and was then seduced, might maintain the action, and her previous unchastity would effect only the measure of damages; and *Love v. Masoner*, 6 Baxt. 24, 32 Am. Rep. 522, is to the same effect.

And a number of cases hold that in an action by the father of a seduced female, her character for chastity is in issue, and prior unchastity may be proved, not only to corroborate the defendant, where he denies the seduction, but also in mitigation of damages: *Hogan v. Cregan*, 6 Rob. (N. Y.) 138; *Shattuck v. Myers*, 13 Ind. 46; 74 Am. Dec. 236; *White v. Murland*, 71 Ill. 250; 22 Am. Rep. 100; *Drish v. Davenport*, 2 Stew. 266.

But these authorities leave the main question untouched, which counsel for appellant seek to present on this appeal, and that is, What is the legal effect of lewd practices and habits of the female alleged to have been seduced at and immediately before such alleged seduction? Do they only mitigate the damages, and corroborate the defendant's denial of the seduction? or do they go further, and defeat the plaintiff's right of recovery entirely, if the jury are satisfied that the female alleged to have been seduced was in the habit of seeking opportunities for criminal indulgence, not only with the defendant, but with various other persons, about the time of such alleged seduction? In other words, can a woman who engages in criminal indulgence with her male acquaintances as opportunities present themselves, and who will make opportunities for that purpose, be said to be seduced within the true intent and meaning of the statute? Is such a woman drawn aside from the path of virtue and overreached by the artifice, deception, and cunning of the seducer? Unless these questions can be answered in the affirmative, it is not perceived that she was "seduced." To hold otherwise would be to break down all distinctions between the virtuous and vicious, and to place the common bawd on the same plane with the virtuous woman whose life was pure, and whose confidence had been betrayed by the heartless libertine.

Instruction No. 5, while it is subject to some verbal criticism, contained a correct legal proposition, as applied to the facts of this case, and the same ought to have given to the jury.

No. 1 was misleading, and properly refused, for the reason that it required the jury to find "that the plaintiff's daughter was at and prior to the alleged seduction a chaste female," etc. At some period of her life prior to the alleged seduction she may have been unchaste, and then reformed. But this

instruction would allow no reformation. It has already been shown that this is not the law.

3. The defendant's counsel asked one other instruction, as follows: "The fact that the plaintiff's daughter was suffering at the time of her alleged seduction with a venereal disease, if you find such fact to exist, would, if not explained, in itself be sufficient evidence of unchastity to prevent a recovery in this action." This instruction was properly refused, for the reason that it invades the province of the jury. It is the right of the jury, and not the court, to determine the effect of evidence, unless in particular cases where its effect is declared by the code.

It follows from what has been said that the judgment must be reversed, and the cause remanded for a new trial.

SEDUCTION — DEFINITION OF THE CRIME. — Under the Michigan statute, seduction is committed if a man has carnal intercourse with a woman, to which she assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which intercourse she would not have assented or yielded without such promise: *People v. De Fore*, 64 Mich. 693; 8 Am. St. Rep. 863, and extended note 870-872, upon the crime of seduction as defined in the different American statutes; *State v. Horton*, 100 N. C. 443; 6 Am. St. Rep. 613; extended note to *State v. Carron*, 87 Am. Dec. 405-411. To authorize a conviction for seduction under the Alabama code, the woman alleged to have been seduced must not only be unmarried, but chaste in fact at the time of the crime; and the question is not as to her reputed chastity, but as to her actual chastity: *Hussey v. State*, 86 Ala. 34; *State v. Prier*, 49 Iowa, 531; 31 Am. Rep. 155; *Polk v. State*, 40 Ark. 482; 48 Am. Rep. 17.

SEDUCTION — CHASTITY — REFORMATION OF AN UNCHASTE WOMAN. — An unmarried female may reform and gain character for chastity, within the meaning of section 4209 of the Iowa Revision of 1860, making the seduction of a female of "previously chaste character" a crime, where she has become unchaste by sexual intercourse: *State v. Carron*, 18 Iowa, 372; 87 Am. Dec. 401, and note 408.

EVIDENCE — THE CREDIBILITY AND WEIGHT OF EVIDENCE is a question for the jury to decide: *Turner v. Child*, Dev. 25, 133, 331; 17 Am. Dec. 555; *Fisher v. Duncan*, 1 Hen. & M. 563; 3 Am. Dec. 605; *Pawson v. Donnell*, 1 Gill & J. 1; 19 Am. Dec. 213; *Stovall v. Farmers' etc. Bank*, 8 Smedes & M. 305; 47 Am. Dec. 85; *Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 776; *Fleming v. Marine Ins. Co.*, 4 Whart. 59; 33 Am. Dec. 33; *Cohea v. Hunt*, 2 Smedes & M. 227; 41 Am. Dec. 589; *State v. Smart*, 4 Rich. 356; 55 Am. Dec. 683; *Morrison v. Whiteside*, 17 Md. 452; 79 Am. Dec. 661; *Buffington v. Cook*, 35 Ala. 312; 73 Am. Dec. 491; *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736; *Nichols v. Sixth Ave. R. R. Co.*, 38 N. Y. 131; 97 Am. Dec. 780; *Henry v. Sioux City etc. R'y Co.*, 75 Iowa, 84; 9 Am. St. Rep. 457, and note 462; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804; *Hussey v. State*, 86 Ala. 34; *Lamb v. Taylor*, 67 Md. 85.

STATE v. GODFREY.

[17 OREGON, 300.]

ASSAULT — DEFINITION. — To constitute an assault, there must be an intentional attempt to do injury to the person of another by violence, and such attempt must be coupled with the present ability to do the injury attempted.

ASSAULT. — To POINT EMPTY GUN AT ANOTHER, at a distance from thirty to seventy yards, whereby such other is put in fear, and flees, is not an assault with a dangerous weapon.

ASSAULT — DANGEROUS WEAPON. — A dangerous weapon is one capable of producing death or great bodily harm. An unloaded gun in the hands of the defendant, at a distance of four or five rods from the party alleged to have been assaulted, is not a dangerous weapon.

ASSAULT — LETHAL WEAPONS. — Guns, swords, knives, pistols, and the like, are clearly lethal weapons, as matter of law, when used within striking distance from the person assaulted; all others are lethal or not, according to their capability to produce death or great bodily harm in the manner in which they are used, and of this the jury must always be the judges. In the particular case under consideration, the gun was a lethal weapon, if it was loaded; otherwise it was harmless.

ASSAULT — INTENT. — No intent is necessary to constitute crime of being armed with a dangerous weapon, and assaulting another therewith, other than such as may be embraced in the act of making an assault with a dangerous weapon. A specific intent to inflict death or great bodily harm is unnecessary.

W. M. Colvig, district attorney, for the state.

Cogswell and Cogswell, and J. W. Hamaker, for the appellant.

STRAHAN, J. The defendant was indicted by the grand jury of Klamath County for being armed with a dangerous weapon, to wit, a Winchester rifle, and assaulting H. J. Chrisman with such rifle.

The evidence of the assault introduced upon the trial tended to prove that the defendant, when not less than thirty yards nor more than seventy yards from said Chrisman, pointed a Winchester rifle at him, and threatened to kill him if he did not turn back. His words were, "Turn back, you dirty son of a b——h, or I will kill you." The transcript shows there was no direct evidence that the gun was loaded, or that the defendant cocked it, or did anything except to point the gun at Chrisman, and use the language above quoted. There was evidence tending to prove that Chrisman was frightened, and fled from the defendant.

At the conclusion of the evidence, the court, amongst other instructions, gave the jury the following: "If you believe, from the evidence, beyond a reasonable doubt, that, at the time and place as charged in the indictment, B. A. Godfrey

pointed a gun at Herbert J. Chrisman in a menacing and threatening manner, as if to shoot, and the said Chrisman was then within carrying distance of said gun, and that the said Chrisman, as a reasonable man, was, under the circumstances as then presented to him, justified in believing that the defendant intended to shoot him, and did so believe, and was in fear of being shot by said defendant, and, under such fear, fled from said defendant, without knowing whether said gun was loaded or not, then the defendant is guilty, no matter whether the gun was loaded or not."

The court further instructed the jury as follows: "If you believe, from the evidence, beyond a reasonable doubt, that, at the time and place as charged in the indictment, said Herbert J. Chrisman and another person were in a cart or buggy together, and that said defendant, Godfrey, pointed a loaded gun at both of them in a threatening manner, and under the circumstances mentioned in the last instruction (No. 1), within carrying distance of said gun, then you must find the defendant guilty."

To the giving of each of these instructions, the defendant excepted.

The defendant asked the following instructions, all of which were refused by the court, and separate exceptions saved to the ruling in each case:—

"1. A dangerous weapon is one capable of producing death or great bodily harm.

"2. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.

"3. An unloaded gun, at a distance of four or five rods from the party alleged to have been assaulted, is not a dangerous weapon.

"4. Whether or not the defendant in this action was, at the time of this alleged assault, armed with a dangerous weapon, is a question of fact which you are to determine from the evidence, and in doing so, you are to take into consideration all the circumstances,—whether or not the gun was loaded, the distance the parties were from each other, the manner of its use,—and unless you are satisfied, beyond a reasonable doubt, from all the circumstances in the case, that he was armed with a weapon which, at the distance the parties were from each other, was capable of producing death or great bodily injury, then you must acquit.

"5. One of the questions for you to determine is, whether the gun with which it is charged the defendant committed the assault was loaded; and unless it is established beyond a reasonable doubt that the gun was so loaded, you will have to find that it was not loaded; and should you find that the gun was not loaded, then you will have to decide, from the evidence, whether an unloaded gun, at the distance the defendant was from the prosecuting witness at the time of the alleged assault, was a dangerous weapon, and if not, then you must acquit."

The first instruction given by the court, to which an exception was taken in effect, told the jury that if the defendant pointed the gun at Chrisman, under the circumstances therein enumerated, the defendant was guilty, no matter whether the gun was loaded or not. This is equivalent to saying that it is a felonious assault to point an empty gun at another, whereby he is put in fear, and flees. Such an act, no doubt, deserves the severest reprehension, but unless it constitutes an assault, the conviction cannot be sustained, no difference what view we may take of the other questions presented.

Burrill's Law Dictionary defines an assault to be an unlawful setting upon one's person: Finch's Law, b. 3, c. 9. An intentional attempt by violence to do a corporeal injury to another: Wharton's Crim. Law, 311; 1 Hill, 351. An attempt or offer, with force or violence, to do a corporeal hurt to another, as by striking at him with or without a weapon, or presenting a gun, etc. Rapalje defines it thus: "An assault is: 1. An attempt unlawfully to apply an actual force, however small, to the person of another, directly or indirectly; 2. The act of using such a gesture towards another person as to give him reasonable grounds to believe that the person using the gesture meant to apply actual force to his person": 1 Law Dict., tit. Assault. Any willful and unlawful attempt to offer with force to do a corporeal injury to another: 1 Abbott's Law Dict., tit. Assault, 90.

But these definitions furnish no certain or satisfactory solution of the question, and if we look at the adjudged cases, they appear to be irreconcilable.

Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42, is a late and well-considered case holding that to present and aim an unloaded gun at a person within shooting distance, in such a manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for a criminal assault,

although it may support a civil action for damages. This case presents the leading authorities on both sides of this question, and sums up the result reached by the court thus: "The true test cannot be the mere tendency of an act to produce a breach of the peace; for opprobrious language has this tendency, and no words, however violent or abusive, can at common law constitute an assault. It is unquestionably true that an apparent attempt to do corporeal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace; for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted had a right to act upon appearances when they create reasonable grounds from which to apprehend imminent peril. There can be no difference in reason between presenting an unloaded gun at an antagonist in an affray and presenting a walking-cane as if to shoot, providing he honestly believes, and from the circumstances has reasonable grounds to believe, that the cane was a loaded gun. Each act is a mere menace, the one equally with the other, and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages."

The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or in creating alarm in the mind; for one may obviously be assaulted, although in complete ignorance of the fact, and therefore entirely free from alarm: *People v. Lilly*, 43 Mich. 525; 1 Crim. Law Mag. 605. And one may be put in fear under pretense of begging, as in Tapline's case, occurring during the riots in London, decided in 1780, and reported in 2 East P. C. 712, and cited in many of the old authorities.

These views are sustained by *State v. Napper*, 6 Nev. 118; *Regina v. James*, 47 Eng. Com. L. 530; *Black v. Bernard*, 88 Id. 365; *People v. Lilly*, 43 Mich. 521; *Robinson v. State*, 81 Tex. 171; *Lawson v. State*, 30 Ala. 14; *McKay v. State*, 44 Tex. 43; 3 Greenl. Ev., sec. 61; *People v. Jacobs*, 29 Cal. 579. Numerous other cases to the same effect are carefully collated in 1 Am. & Eng. Ency. of Law, 815, 816.

I think these authorities clearly show that to constitute an assault there must be an intentional attempt to do injury to the person of another by violence, and that such attempt must be coupled with a present ability to do the injury at-

tempted. It is equally manifest that the element of fear or apprehension on the part of the person against whom the attempt is made cannot be controlling, or in any way influence the conclusion, for the reason that such person may be assaulted and be wholly unconscious of the injury. I am therefore of the opinion that the first instruction given by the court was erroneous.

2. Turning now to the instructions asked on the part of the defendant, we are of the opinion that No. 1 ought to have been given. A dangerous weapon is a necessary element in the commission of the crime for which the defendant was indicted. Without it he could not be guilty of the felonious assault charged. The instructions asked briefly defined such weapon, and its refusal was error.

3. So in regard to instruction No. 2 asked by defendant, defining an assault. An unlawful attempt to do injury to the person of another, without the ability to accomplish it, would not constitute an assault, nor would the ability without the attempt be sufficient. Both elements must concur. This instruction, then, should also have been given.

4. Instruction No. 3 asked by the defendant should also have been given. Manifestly, an unloaded gun in the hands of the defendant four or five rods from Chrisman was a harmless implement, with which no personal injury could possibly have been inflicted upon Chrisman. Without the use of a dangerous weapon, the defendant could not commit the crime charged; and the weapon was not dangerous in a legal sense, unless at the time of its use it was capable of producing death or great bodily harm.

5. Under the circumstances disclosed by this record, the fourth instruction asked by appellant contained a correct statement of the law, and should also have been given. Some weapons under particular circumstances are so clearly lethal that the court may declare them to be such as a matter of law. Of this class are guns, swords, knives, pistols, and the like, when used within striking distance from the victim; all others are lethal or not, according to their capability to produce death or great bodily harm in the manner in which they are used, and of this the jury must always be the judges. It is a question of fact, the termination of which properly belongs to them. In the case under consideration, the gun was a lethal weapon, if it was loaded; otherwise it was harmless. It was therefore the peculiar and exclusive province of the

jury to say whether this was so or not; and the court erred in so refusing to instruct them.

6. Instruction No. 5, also asked by the defendant, depends upon the same principles as No. 4, and its refusal was error, for the same reasons given in reference to No. 4.

7. The defendant also asked the court to give the jury the following instruction, numbered 7: "Unless it is established beyond a reasonable doubt that the defendant at the time of the alleged assault intended to inflict death or great bodily harm upon Chrisman, coupled with a present ability to carry the same into effect, you must acquit." This instruction was properly refused. No specific intent is necessary to constitute the crime under this statute, other than such as may be embraced in the act of making an assault with a dangerous weapon. This simply embraces the intentional and unlawful use of a dangerous weapon, by means of which an assault is committed with such weapon upon the person of another.

One or two other unimportant exceptions were taken, but it is unnecessary to notice them, as every principle of law involved in the case is disposed of by what is said on the questions above suggested.

The judgment will be reversed, and a new trial had in the court below.

ASSAULT — WHAT CONSTITUTES THE CRIME.—Under the Arkansas statute, both the intention to commit and the ability to commit a battery is necessary to constitute an assault: *Pratt v. State*, 49 Ark. 179; and such has been held to be the law in a recent California case: *People v. Dodel*, 77 Cal. 293. Assault and battery consists in unlawful and unjustifiable use of force and violence upon the person of another, however slight: *Commonwealth v. McKie*, 1 Gray, 61; 61 Am. Dec. 410. An assault is an intentional attempt, by violence, to do an injury to the person of another: *State v. Davis*, 1 Ired. 125; 25 Am. Dec. 735, and note 737.

ASSAULT — INSTANCES OF. — It is an assault to raise an ax and threaten to split another down if he does not do a certain act: *State v. Morgan*, 3 Ired. 186; 38 Am. Dec. 714, and note 719. One is guilty of assault who delivers to another a thing to be eaten containing "love powders," knowing that it contains a foreign substance, and concealing the fact, if the other party in ignorance of the fact eats it and is injured thereby: *Commonwealth v. Stratton*, 114 Mass. 303; 20 Am. Dec. 350, and note 352. It was an assault, where defendant advanced upon complainant with a stick and a knife, threatening to kill him; and, complainant retreating into a storehouse, defendant walked up and down in front of such storehouse, threatening to whip him if he came out: *State v. Martin*, 85 N. C. 508; 39 Am. Rep. 711. See note to *Mercer v. Corbis*, 10 Am. St. Rep. 76.

ASSAULT — INTENT. — The intent necessary in an assault is manifested by the use of a deadly weapon on the part of the defendant, but an assault may

be committed even without using a deadly weapon: *Monday v. State*, 32 Ga. 672; 79 Am. Dec. 314. Where the intent in committing an assault is shown merely by the deed, it cannot very well be stretched beyond it: *People v. Ross*, 66 Mich. 94. The intent with which an assault was made is a question for the jury: *State v. Daly*, 16 Or. 240.

WEAPONS, WHAT ARE DANGEROUS.— Courts judicially know some weapons to be dangerous, without alleging and proving such fact: *Dollarhide v. United States*, 1 Morris, 233; 39 Am. Dec. 460. A gun is a dangerous weapon: *State v. Huntley*, 3 Ired. 418; 40 Am. Dec. 416; so is a spring-gun: *Simpson v. State*, 59 Ala. 1; 31 Am. Dec. 1; so is an ax: *State v. Ostrander*, 18 Iowa, 456; but a pitchfork handle is not a dangerous weapon within the meaning of statutes against assault with a dangerous weapon: *Filkins v. People*, 69 N. Y. 101; 25 Am. Rep. 143.

FINLAYSON v. FINLAYSON.

[17 OREGON, 247.]

DEED — PAROL EVIDENCE TO VARY. — ABSOLUTE DEED TO REAL PROPERTY CONVEYS FROM GRANTOR TO GRANTEE all the title of the former, and he will not be allowed to prove by parol evidence that it was made in trust for him, or that there was a reservation in his favor of any right not expressed therein, nor that there was no consideration for its execution, where he acknowledges therein the receipt of one. He cannot show by such evidence that the object or purpose of the deed was different from that implied by its terms, except where the instrument was executed to secure the payment of a debt or the performance of some other act.

DEED MAY BE REFORMED IN CASE OF MISTAKE made in reducing its terms to writing, or it may be set aside for fraud or duress; and a trust may arise out of a transaction which will be enforced in face of the express terms of a deed, but it must be an implied trust, arising by operation of law. The parties to a deed cannot create a trust in favor of the grantor except by an instrument in writing declaring the same.

FRAUD WILL VITIATE CONTRACT; but where the parties stand upon an equality of footing, the fraud must consist of a false representation of a material fact, and the party to whom it is made not be able, by the exercise of a reasonable caution and vigilance, to detect its falsity.

HUSBAND AND WIFE — IMPROVEMENTS MADE BY HUSBAND ON WIFE'S LAND. — A husband conveyed to his wife, in her own right, valuable premises which he had acquired by the joint labor and earnings of both since their marriage. He was induced to make the conveyance through the urgent solicitations of his wife, and her assurances that he should enjoy the premises with her as a home in the future as he had previously; and after the conveyance she urged him by similar assurances to make improvements on the land, which he did at an expense to himself of at least four thousand dollars. After the completion of said improvements, and about three years and a half after the conveyance, during which time they had occupied the premises as formerly, the wife expelled the husband therefrom. In such case, the solicitations and assurances of the wife, and her subsequent expulsion of the husband from the premises, did not amount to such fraud as would justify a court of equity in setting

aside the conveyance; but to urge him to make the improvements with the understanding that he was to enjoy them, and then deny him the right, without paying him therefor, was bad faith, and fraudulent, and the expenses incurred by the husband in making the improvements should be paid to him by the wife, and the amount thereof be made a charge upon the premises in his favor.

R. S. Anderson, I. D. Haynes, Thornton Williams, and M. L. Olmsted, for the respondent.

A. J. Lawrence and C. W. Manville, for the appellant.

THAYER, C. J. This appeal is from a decree rendered in a suit brought by the respondent against the appellant to set aside a deed to real property executed by the former to the latter on the fifteenth day of February, 1881, or, as alternate relief, that a claim in favor of the latter for service and expenses be charged upon the said real property.

The parties are husband and wife, and it is claimed by respondent that the appellant, through fraud and deceit, induced him to execute the said deed to her. The facts constituting the fraud, as alleged in the complaint, are in substance as follows: That appellant did not care for or love respondent as her husband for many years prior to the execution of the deed, and conspired with their daughter to obtain said real property in her own right, and to expel the respondent therefrom, and to exclude him from all enjoyment thereof; that, in order to accomplish that object, the appellant fraudulently represented to the respondent that she loved him, that in case of his death she ought to have his lands, and that a deed conveying them to her, executed during his lifetime, would in no wise affect his equal enjoyment of them with her, and that such lands should be their home in their old age, and that if he should suddenly die, it would be better for her to take and have the lands already in her own right; that the love and affection he bore her and the children were fully reciprocated, and that if he would, for the sake of that love and affection, convey the lands to her, and thereafter build upon and improve the same, he would thereby provide a home for her, and to which he would ever be welcome, and be treated with the same love and affection which she was pretending to entertain for him; that if he would make such deed, erect a house on the lands, and improve the same, he should possess and enjoy it the balance of his life; that respondent believed such representations, and, relying upon the same, executed the deed, and thereafter built a house thereon, and made other improvements, of the value

of four thousand dollars; that he expended about three thousand dollars in making the improvements, besides his personal work and labor in accomplishing the same, and which increased the value of the premises more than five thousand dollars; that as soon as said labor, improvements, etc., were completed, about October 1, 1884, appellant turned respondent out of doors, took the grain in the granaries, which he had sown and garnered, and drove him away, saying: "I have got now what I have been working for for twenty years," and asserted her claim to the premises, and demanded that he should vacate them, or that she would charge him rent if he staid thereon; that thereafter appellant commenced a suit for a divorce, charging respondent with cruel and inhuman treatment, which suit was still pending, and to which he had a good defense upon the merits; that by reason of the premises, respondent was homeless, reduced in circumstances almost to destitution, at an age too late in life to toil; that no consideration passed from appellant to respondent for said deed, nor had appellant accounted with respondent for the expenses, toil, labor, and services performed by him, and that she refused to account for the same; and he prayed for a cancellation of the deed, or, in case that could not be granted; for an allowance of a just claim for said services and expenses, and that the same be declared a lien on the said land.

The appellant filed an answer in the suit, denying the allegations of the complaint, and the case was heard upon depositions and proofs, and the circuit court decreed to the respondent one half of the land deeded.

Neither party has printed the evidence and proofs in the briefs furnished, as required by the rules of this court, and we have no means of ascertaining the facts of the case without reading the depositions which have been sent here with the transcript, unless we adopt the findings of the circuit court. The findings are full, and as neither party claims but that they were warranted by the evidence, we feel justified in relying upon them.

The circuit court found that the parties were married in Scotland in the year 1846, and had lived together as husband and wife ever since that time until about October 1, 1884; that the respondent was of the age of sixty-two years, and the appellant sixty-three years; that the issue of the marriage was eight children, four of whom were living; that they were all females, and all married except the youngest, who was twenty-

seven years old, and resided with the appellant; that the parties settled upon the land in question in the fall of 1864, and by their joint labor and earnings the respondent acquired title thereto; that they had fenced and cultivated a portion of the land, and had built a house on it; that respondent was an ignorant and uneducated man, — was not able to read or write; that during their residence in Oregon the respondent had, up to about October, 1884, trusted the appellant with keeping the accounts and moneys received by him from the sales of stock, the proceeds of the produce of the farm, and the payment of all bills created in managing their business of farming, and raising cattle and horses; that the respondent was the owner of 280 acres of land of the aggregate value of about \$2,500, about 70 head of horses of the value of \$2,100, 10 cows of the value of \$200, and 27 sheep of the value of \$60, but was indebted in the sum of \$2,000; that on or about March 1, 1881, the respondent fell from his horse, and was injured, which confined him to his bed from four to six weeks; this, with other sickness, and the risk he was constantly taking in his business, so alarmed him as to create a presentiment that he would meet with a sudden death by accident. If this were to happen, he thought the appellant would lose her home, and that it was necessary, in order to prevent such a result, to deed her the land in controversy; that it consisted of 244 acres, and was of the value of \$12,000; and that, in order to accomplish the purpose mentioned, the respondent did, on the fifteenth day of February, 1881, execute and deliver to the appellant a deed to the same; that there was no money paid for the land, and that the only consideration therefor was love, affection, confidence, and trust which the respondent entertained for the appellant; that the parties by their joint and individual efforts acquired all the property mentioned, which, in October, 1884, amounted in value to seventeen thousand five hundred dollars; that prior to the execution of said deed, and from about the year 1876, the appellant had importuned the respondent to make her a deed to some of his property, which, she said, "was the custom of other husbands to do"; that respondent had proposed to deed to her the said 280 acres of land, but the appellant would not accept it, desiring him to convey to her the premises in question, which the former finally consented to do; that shortly after the execution of said deed, the appellant began to persuade the respondent to build upon the land deeded to her, which the respondent reluctantly did,

erecting thereon a dwelling-house, at a cost, including work, labor, and material furnished, of one thousand six hundred dollars, all of which was paid for by him except about two hundred dollars; that the respondent, after the execution of the said deed, continued to occupy said premises, cultivate the same, and keep his stock thereon as he had previously done, until October 1, 1884; that during said time he reset, repaired, and built a fence around two thirds of the land, cleared brush and timber from portions of it, leveled the surface thereof, and did work to the value of three thousand dollars, no part of which had been paid or tendered him; that on said last-mentioned date the appellant determined that she would no longer live with the respondent as a wife, and that he should not remain upon the premises, and instituted aggressive measures to drive him off.

I conclude from these and other findings made by said circuit court that the parties married and lived together about the same as married people usually do; that they were industrious and frugal, and thereby accumulated a reasonable competency; that the appellant conceived the idea that she should have the title to the property in question in her own name, and by her urgent solicitations induced the respondent to execute the deed in question. It does not appear that she entertained a design while she was importuning the respondent to make the deed of procuring it for the purpose of dispossessing him or of expelling him from the premises. She undoubtedly thought that a conveyance of the land to her would exhibit a mark of confidence, and enable her to assume more individuality. Neither party anticipated that the execution of the deed would effect a change of the occupancy or management of the property conveyed. They both doubtless expected that the same course which they had theretofore pursued with reference to the property would be continued, and that their relations generally would be unaffected. The circuit court, actuated by a generous spirit of equity, divided the property between the parties. This seems to have been a just disposition of the affair, in view of the circumstances of the particular case, and we would gladly sustain it if we could do so in accordance with legal principles. But equity, like the common law, must be controlled by general rules, which are as unalterable in the one case as in the other. The intention of the respondent in executing the deed to the appellant must

be ascertained from the terms of the instrument, and the circumstances surrounding the transaction.

When one party duly executes his deed to real property to another, he is precluded from showing by parol testimony that the object and purposes of the instrument were different from that implied by its terms, except in the case of deeds executed as a security for the payment of debts. "The grantor, in an absolute conveyance of land, not alleging fraud or mistake, cannot prove by parol that the grant was in trust for himself": *Sturtevant v. Sturtevant*, 20 N. Y. 39; 75 Am. Dec. 371.

Nor can a deed be invalidated by parol evidence that there was no consideration for its execution, where there is one acknowledgment in it.

"In every case where a consideration is required, it is not necessary that the consideration be actually passed to the grantor, if the receipt of a proper consideration is acknowledged by him in the deed. But it must be acknowledged in the deed, or it must be proved *aliunde*, to have actually passed to the grantor. But while parol evidence is inadmissible to contradict the acknowledgment of consideration in order to invalidate the deed between the grantor and grantee, yet the acknowledgment is only *prima facie* evidence of the character and amount of the consideration. The amount and kind of consideration acknowledged is presumed to be the consideration agreed upon; but it may be shown by parol evidence, in an action to recover the consideration, that a different kind or amount of consideration had been agreed upon": 5 Am. & Eng. Ency. of Law, 436, 437.

Transactions of great importance would have no stability if the parties thereto were permitted to show, by parol proof, that written instruments solemnly executed by them did not mean what the language of the instrument purported. An absolute deed to real property conveys from the grantor to the grantee all the title of the former; and he will not be allowed to prove by parol evidence that it was made in trust for him, or that there was a reservation in his favor of any right not expressed therein, nor that the deed is invalid for the want of consideration, where he acknowledges therein the receipt of one.

A deed may be reformed in case of a mistake made in reducing its terms to writing, or it may be set aside for fraud or duress; and a trust will often arise out of a transaction which will be enforced in face of the express terms of a deed; such

a trust, however, belongs to that class which are denominated implied trusts, and which arise by operation of law.

No implied trust can arise from the facts in this case; nor could any trust have been created in favor of the respondent in the premises conveyed except by an instrument in writing declaring the same.

The deed in question can only be avoided by proof that the appellant procured it to be made through fraud, and it is apparent that the findings of the court are not sufficient to warrant the conclusion that such was the fact. The fact that the appellant solicited and importuned the respondent to execute the deed, and that the parties, about three years and a half thereafter, had difficulty, and the appellant asserted her legal rights as owner of the premises, and attempted to expel the respondent therefrom, do not establish a fraudulent intent on her part to deprive him of his property. She had a right to persuade him to make her a deed of a part of the property which her labor and earnings had helped to accumulate, and after obtaining it, to manage, sell, convey, or devise the same by will, to the same extent and in the same manner that he could property belonging to him. Section 2992 of the Annotated Code of Oregon vests her with that right, and the provision was in force at the time of the execution of the deed. She was also empowered, in case the respondent had possession or control of the property, to maintain an action growing out of the same, in the same manner and extent as if they were unmarried: Ann. Code, sec. 2870.

I cannot discover, from the findings, that any such deception was practiced upon the respondent in procuring the execution of the deed as would justify the court in setting it aside. The appellant undoubtedly, in urging him to convey the land to her, held out the inducement that they would continue to occupy it as they formerly had done, and she probably believed at the time that such would be the case; but trouble seems to have arisen between them, occasioning serious discord in their affairs. This may have been the fault of the appellant; but if so, it would constitute no ground for avoiding the deed.

The respondent should have protected himself by a condition in that instrument against the consequences of such an occurrence.

Courts cannot relieve parties from imprudent bargains; they must suffer the consequences of their indiscretion, unless an

undue advantage has been taken of them. Fraud will vitiate a contract; but where the parties to it stand upon an equality of footing, the fraud must consist of a false representation of a material fact, and the party to whom it is made not be able, by the exercise of reasonable caution and vigilance, to detect its falsity. But upon the other ground of relief claimed in the complaint in the suit, I think the respondent should prevail. The circuit court found that he was induced and led to believe, and did believe, that in doing the work and labor in building the new house, making the fencing, and other improvements upon the premises, he was making for himself and appellant a more comfortable home, which they would enjoy the benefits of, and of the profits of the land during the remainder of their lives, and that the fact of his making the deed would not prevent his enjoyment of the land and the improvements thereon, or in any manner disturb the relation between himself and the appellant, and that they would hold the property jointly.

Under such circumstances, the respondent should, when he has been expelled from the premises by the act of the appellant, be paid for the labor and the expense incurred by him. It would be inequitable to allow the appellant to retain the fruits of the respondent's labor and expense, after having induced him to bestow them under the assurances mentioned, which she had failed to observe. She had the right, under the statute, to take the management of the premises, but to urge him to make the improvements with the understanding that he was to enjoy it, and then deny him the right, without paying him therefor, is bad faith, and fraudulent.

This court held in *Fraser v. Wheeler*, 4 Or. 190, that a court of equity would not encourage a married woman to perpetrate a fraud; and that where she had received money upon a contract for the sale of her land, and the purchaser was induced to put valuable improvements upon it, the amount of the money and value of the permanent improvements should be charged upon the lands. In that case the woman was dealing with an outside party; but I think a husband has rights in such matters which a wife is bound to respect.

The facts in this case show that the respondent bestowed labor and expense upon the land in question, after the execution of the deed to the appellant, to the amount at least of four thousand dollars, and that he was induced to do so upon the assurance that he should occupy and enjoy the property;

that in October, 1884, the appellant notified him that he should not remain on the premises any longer, and that since that time he has had no use of them. In view of these facts, I am of the opinion that the respondent is entitled to be paid said sum of four thousand dollars, with interest thereon at the rate of eight per cent per annum from the first day of November, 1884; and that the amount should be made a charge and lien upon the premises conveyed by the respondent to the appellant; and that in default of the payment of the same, with accrued interest, within ninety days after the entry of the decree herein, that the respondent have execution for the sale of said premises for the satisfaction of such amount and accruing interest, as in case of execution on foreclosure of lien on real property, and that the respondent recover costs and disbursements in the suits in both courts.

DEED, PAROL EVIDENCE TO VARY: See *Green v. Batson*, 71 Wis. 54; 5 Am. St. Rep. 194, and extended note 197-201; *Adams v. Hudson Co. Bank*, 10 N. J. Eq. 535; 64 Am. Dec. 469, and note; *Sullivan v. Lear*, 23 Fla. 463; *ante*, p. 388, and note. Where there is no fraud or mistake, parol testimony cannot vary or contradict the written terms of a deed: *Tait v. Central Lunatic Asylum*, 84 Va. 271; and compare *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note; *Smith v. Cleave*, 114 N. Y. 190; *ante*, p. 627, and note; *Adams v. Wilson*, 12 Met. 138; 45 Am. Dec. 240, and note, as to parol testimony to vary or contradict written instruments in general. A deed purporting to be for a consideration cannot be contradicted by evidence that there was no consideration: *Hammond v. Woodman*, 41 Me. 177; 66 Am. Dec. 219; but when the consideration in a deed is the present payment of money, parol evidence is admissible to show that the real consideration was the promise of the grantee to execute a will in favor of the grantor, each of said considerations being valuable: *Manning v. Pippen*, 86 Ala. 357. But there are cases in which parol evidence is admissible to explain and qualify the terms of a written instrument: *Wood v. Moriarty*, 15 R. I. 518; *Cleveland v. Choute*, 77 Cal. 73; and to identify persons and things named in a writing: *Andrews v. Dyer*, 81 Me. 104; *Doe v. Weeks*, 86 Ala. 329; *Dougherty v. Chestnutt*, 86 Tenn. 1. Still, where the delivery of a deed complete on its face to the grantee himself, or to one of the grantees, is absolute, it cannot be qualified or explained by parol testimony so as to make it operative as an escrow: *Hargrave v. Melbourne*, 86 Ala. 270.

DEEDS — MISTAKES IN. — Equity may relieve against mistakes in conveyances, whether such mistakes be of fact or of law: *Benson v. Markoe*, 31 Minn. 30; 5 Am. St. Rep. 816; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63, and note; but equity will not correct a mistake which will result in making a void instrument valid: *Powell v. Morisey*, 98 N. C. 426; 2 Am. St. Rep. 343, and note 346. But evidence must be clear, positive, and convincing in order to reform a deed on account of a mistake: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319; *Benson v. Markoe*, 31 Minn. 30; 5 Am. St. Rep. 63, and note; *Cross v. Bean*, 81 Me. 525; *Hollenback's Appeal*, 121 Pa. St. 322.

DEEDS, MISTAKES IN — RECENT CASES BEARING ON THIS SUBJECT. — Though a deed cannot be reformed in an action at law (*Winnipisogee Paper Co. v. Eaton*, 64 N. H. 234), equity will often reform deeds for mistake; as where two deeds are executed by the same grantor to the same grantee, and the second deed shows that the first deed conveyed more than was intended, and the grantee accepts the second deed and claims under it, a court of equity will reform the first deed; *Sepulveda v. Sepulveda*, 77 Cal. 605. So a grantor in a deed may have a mistake in a deed corrected as against an heir at law of the grantee in such deed: *Savage v. McCorkle*, 17 Or. 42. So where it was agreed that support of the grantor should be a part of the consideration of a deed, and should be inserted in the deed, but by mistake was omitted, the grantor may have such deed corrected in equity: *Id.*; and in like manner mistakes made by the draughtsman of a deed may be corrected: *Felton v. Leigh*, 48 Ark. 498; compare *Grosbach v. Brown*, 72 Wis. 458; *Eva v. McMahon*, 77 Cal. 467. But it is well settled that where a deed is fairly obtained, without mistake or fraud, it cannot be vacated or reformed: *Taylor v. Cayce*, 97 Mo. 242; *Hollenback's Appeal*, 121 Pa. St. 322. And even a mistake to authorize a reformation of a deed by a court of equity must be mutual: *Andrews v. Andrews*, 81 Me. 337; *Furley v. Desloude*, 69 Tex. 458. Harmless mistakes which work no real injury, and do not violate the intention of the parties to a deed, will not occasion a reformation of such deed: *Helm v. Wilson*, 76 Cal. 476; *Stout v. Taul*, 71 Tex. 438.

DEEDS — FRAUD. — A want of consideration in a deed may be shown, notwithstanding the recital thereof, with and as a part of the fraud which is charged in obtaining the deed: *Brisson v. Brisson*, 75 Cal. 525; 7 Am. St. Rep. 389, and note 197; and parol evidence may be introduced to show that fraud was practiced in the execution or acknowledgment of a deed: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552.

FRAUD WILL AVOID A DEED AT LAW: See *McArthur v. Johnson*, Phill. (N. C.) 317; 93 Am. Dec. 593, and extended note 596-598; *Fisher v. Bishop*, 103 N. Y. 25; 2 Am. St. Rep. 357, and note.

HUSBAND AND WIFE — DIVISION OF PROPERTY. — Where a wife wrongfully procures the title to the property of her husband to be conveyed to her, and then drives him from the premises, and he afterwards obtains a divorce because of her ill-treatment, the property should be divided equitably between the parties, and the husband should have a fair share thereof: *Snodgrass v. Snodgrass*, 40 Kan. 494.

CAUFIELD v. CLARK.

[17 OREGON, 473.]

ADVERSE POSSESSION. — ONE WHO BY MISTAKE AS TO BOUNDARIES enters upon and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake.

G. G. Bingham, for the appellant.

Daly and Butler, and Warren Truitt, for the respondent.

LORD, J. This is a suit to determine an adverse claim to certain real property described in the complaint, and to enjoin the defendant from entering upon and taking possession of the same.

The material issue presented by the pleadings, and to which the evidence is chiefly directed, is the title to such property. The claim of the plaintiff is based on adverse occupancy, and his evidence is directed to establishing his title thereto. The defendant claims the same through duly recorded conveyances to and through his predecessors. It is not disputed but that the plaintiff has included the same lands in controversy in his premises, and that he has occupied the same for more than the statutory period. The contention of the defendant is, that the plaintiff and himself were mutually mistaken as to the true boundary between the premises owned by them, and that whatever use and occupancy to which the plaintiff and his grantors have subjected said lands has been under a mistake of the true line, and therefore, within the meaning of the law, does not constitute an adverse holding. The matter in dispute turns wholly on the evidence, and the conclusions to be derived from it, within legal principles, will be decisive of his case.

It is not controverted that if the plaintiff held his possession under mistake or ignorance, but with no intention to claim beyond the true line when discovered, his adverse possession can be maintained against the real owner. In such case, his possession of the land, being by mistake, and not under a claim of right against him, was seised, or with an intention to occupy the land beyond the true boundary when disclosed, does not have the effect to work a disseisin. But the plaintiff claims that this rule is inapplicable to him upon the facts as presented by this record. He insists that the evidence will show that he entered upon and occupied the land in controversy, claiming it as his own, and that no other deduction can be drawn therefrom than his intention to claim it adversely.

"If one, by mistake," said Henry, J., "inclose the land of another, and claim it as his own, his actual possession will work a disseisin; but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his posses-

sion of the land is not adverse": *Walbrunn v. Ballen*, 68 Mo. 164; *Hutchings v. Morrison*, 72 Me. 334.

Mr. Wood says: "The rule has been adopted in some of the states, that where a person takes possession of lands, and, through inadvertence or ignorance as to the true line, takes and holds possession of land not covered by his deed, with no intention of claiming or occupying beyond his actual boundaries, such possession will not support a plea of the statute against the real owner, because, in such case, the possession lacks an essential requisite, namely, an intention to declare adversely, which is an indispensable ingredient to constitute a disseisure. This doctrine has been denied in Connecticut; and in all cases, if a person, under a mistake as to the boundaries, enters and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, he thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake": Wood's Limitations of Actions, sec. 263, and cases cited in notes. The principle stated in this last clause just cited is the rule which the plaintiff insists is applicable to the facts of this case.

No good purpose can be served by encumbering this record with the evidence. It will be sufficient to give the result of our conclusions, as it has impressed us after a careful examination. No question is made as to the extent, duration, or continuity of the plaintiff's occupation. If his case rested upon that, his title would go uncontroverted by the defendant. But it is the fact claimed by the defendant, that his possession was not accompanied by a claim of title,—that it was only a mistake as to the true line, with no intention of claiming beyond his actual boundaries,—that raises the question to be decided.

In our judgment, the evidence, taken as a whole, will not warrant this conclusion. We think it is fairly established by the evidence that the plaintiff has occupied and claimed title to the fence as originally located, which was not on the line as described in the deed, although, by mistake, he supposed it was on such line. It seems to us, also, that the action and conduct of the defendant in respect to this fence, in some particulars, as appears by the evidence, strengthens this conclusion. We think, therefore, the fence has become the true boundary line of the adverse possession, and that the plaintiff is entitled to have the decree of the court below modified, so

as to establish such line in accordance therewith; but it is affirmed in all other respects; and it is also ordered that neither party recover costs in this court.

ADVERSE POSSESSION—MISTAKE.—That land was held through a mistake as to the extent of the boundaries will not destroy the adverse character of the holding, if the party has occupied and received the rents and profits as his own: *French v. Pearce*, 8 Conn. 439; 21 Am. Dec. 680; *Williams v. Harrell*, 8 Ired. Eq. 123; 55 Am. Dec. 442; *Yetter v. Thoman*, 17 Ohio St. 130; 91 Am. Dec. 122; *Russell v. Maloney*, 39 Vt. 579; 94 Am. Dec. 358; *Lindell v. McLaughlin*, 30 Mo. 28; 77 Am. Dec. 593; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612. But for instances of possession through mistake which does not amount to adverse possession, see *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474; *Keen v. Schnedler*, 92 Mo. 516; *Howard v. Reedy*, 29 Ga. 152; 74 Am. Dec. 58; *Worcester v. Lord*, 56 Me. 285; 96 Am. Dec. 456; *Knowlton v. Smith*, 36 Mo. 507; 88 Am. Dec. 152; *Wood v. Willard*, 37 Vt. 377; 86 Am. Dec. 716; compare also *Jones v. Pashby*, 67 Mich. 459; *ante*, p. 589, and note.

HOUSTON v. TIMMERMAN.

[17 OREGON, 499.]

LIS PENDENS—PURPOSE OF DOCTRINE OF.—Strictly speaking, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. The main purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations pending the litigation, its judgment or decree could be rendered abortive, and impossible of execution.

LIS PENDENS.—TENDENCY IN SOME COURTS IS TO RESTRICT APPLICATION OF RULE OF LIS PENDENS to actions or suits affecting title to real property, but it is hardly considered well settled that it may not with equal propriety be applied to the sales of chattels.

LIS PENDENS—GENERAL RULE OF.—One who purchases of either party to the suit the subject-matter of the litigation after the court has acquired jurisdiction is bound by the judgment or decree, whether he purchased for a valuable consideration or not, or without any express or implied notice in point of fact.

LIS PENDENS.—TO GIVE EFFECT TO RULE OF LIS PENDENS, two things seem indispensable: 1. That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit must be so clearly designated that any one may learn from the description what property was intended to be affected by the litigation.

MARRIAGE AND DIVORCE—NATURE OF SUIT FOR DIVORCE, AND EFFECT OF DECREE THEREIN.—In a suit for divorce, the land which goes to the wife as the result of the divorce is not the subject-matter of the litigation, and the court has no jurisdiction to affect or divest the title of the husband to his lands, or to decree that one third of them shall be set apart to the wife, independent of a decree for divorce. Nor has the

plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for divorce.

MARRIAGE AND DIVORCE. — TEMPORARY ALIMONY MAY BE GRANTED PENDENTE LITE, but the title of the real estate of the defendant remains intact, and cannot be affected during the pendency of the litigation, but only when a decree has been rendered that the marriage is dissolved, and then only by force of the statute.

MARRIAGE AND DIVORCE — EFFECT OF DECREE OF DIVORCE ON REAL PROPERTY. — Under provisions of Oregon Code, section 499, it is "whenever a marriage shall be declared dissolved" that the statute operates, — not before, or *pendente lite*, — and the court then becomes authorized, and it is its "duty" "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "owned by the defendant at the time of such decree" for a divorce.

MARRIAGE AND DIVORCE — DECREE IN DIVORCE SUIT — *LIS PENDENS*. — Although the prosecution of a divorce suit might result in a decree which would affect the real property of the defendant, yet such property is not the subject specifically of the litigation, and by reason thereof is not withdrawn from such burdens as might be legally imposed upon it for just claims upon judgments recovered and docketed against its owner prior to divesting him of his title by force of the statute under the decree for divorce, and a purchaser of such lands at an execution sale upon such judgment is not affected by or subject to the rule of *lis pendens*.

MARRIAGE AND DIVORCE — DECREE IN DIVORCE — DESCRIPTION OF PROPERTY AFFECTED. — In a suit for divorce, it has been deemed essential, in order to reach the property of the guilty party, that such property should be described in the complaint and decree, but it is apprehended that this is unnecessary, and that it is a sufficient compliance with section 499 of the Oregon Code to say, in effect, that the party obtaining the divorce is hereby entitled to one third of the real property owned by the other, whatever it may be; and if any question arises as to what property was so owned, it can be determined by appropriate proceedings for that purpose between the parties interested.

Hewitt and Bryant, and Tilmon Ford, for the appellant.

J. K. Weatherford and D. R. N. Blackburn, for the respondent.

LORD, J. This was a suit to partition certain lands described herein.

The defendant denied that the respondent had any interest in said lands, and alleged that she was the owner in fee-simple and entitled to the possession of the whole of said premises. The plaintiff, in reply, denied this, and alleged affirmatively that, some time in July, 1884, she commenced a suit against A. J. Houston for a divorce and alimony, and for an equal undivided one third of the real property then owned by said Houston, and that he was the owner in fee of said real property which was duly described therein; that the summons in said divorce suit was served on —, 1884, and that, prior to

that time, and prior to the twenty-sixth day of September, 1884, the defendant Timmerman had notice that the complaint for divorce and one third of said real property had been filed by the plaintiff against her husband; that on the fifth day of February, 1886, a decree was entered granting a divorce in favor of the plaintiff, and adjudging her to be the owner of the undivided one third of said real property, etc.

The court below, after a trial of said cause, rendered a decree therein, granting the prayer of plaintiff for partition, except as to the 160 acres of land mentioned therein, and partition was ordered and made on June 26, 1888, and confirmed by the court.

The defendant Timmerman derived her title to the premises in dispute in this wise: On the fifteenth day of March, 1880, the plaintiff's husband, A. J. Houston, for value, made and delivered his promissory note to the defendant Timmerman for the sum of \$3,400, with interest at the rate of ten per cent per annum from date; that the said A. J. Houston failing to pay said note, the defendant Timmerman commenced suit on the twenty-sixth day of September, 1884, and caused service of summons to be made upon him on that day; and that on October 27, 1884, the defendant Timmerman recovered judgment against the said A. J. Houston for the sum of \$5,463.87, which, on the same day, was duly docketed in the judgment-lien docket, and thereupon became a lien upon all the real property mentioned in the complaint in this suit. It further appears that on March 19, 1883, said A. J. Houston made and delivered his promissory note to J. T. Williams for one thousand dollars, with interest from date at the rate of ten per cent per annum, payable six months after date, and to secure the payment of the same, executed a mortgage, which was duly recorded, upon the 160 acres of land set out in the complaint. The said Houston failing to pay said note, the mortgage was foreclosed against the said Houston and the plaintiff herein. The defendant Timmerman, however, answered, setting up her judgment, and asked, if the property be sold to foreclose said mortgage, that the overplus, if any, should be applied in payment of her judgment, and a decree was accordingly so entered, etc.; that execution was issued upon said decree, and said 160 acres was sold to the defendant Timmerman for two thousand five hundred dollars; that thereafter, on May 13, 1885, execution was issued upon said judgment, and the remainder of the premises described herein was sold

to the defendant Timmerman, and said sale confirmed, and deeds were fully executed by the sheriff to said defendant.

It will be noticed that the suit of the defendant Timmerman to recover the amount due on the note against A. J. Houston, who was then the husband of the plaintiff herein, was commenced after the suit of the plaintiff for divorce against her husband, and that a judgment was recovered and docketed before a decree in the divorce suit was rendered, and in which one third of the real estate then owned by the husband was decreed the plaintiff. It is true, there was no direct proof of the date of the service of the summons in the divorce suit, but as this will not affect the result reached, it is immaterial. The contention is, that the defendant Timmerman was a purchaser *pendente lite*. There is, however, a preliminary question to be first disposed of, namely, that the appeal was not taken within six months, as allowed by law. The answer to this is, that the objection relates to the interlocutory or first decree, and not to the final decree, and that, as our own code does not authorize an appeal from interlocutory judgments or decrees, but only from such as are final, and the appeal from the final decree being within six months, there was a right of appeal, and the objection, therefore, is unavailing.

An examination of the statutes of the two states from which the authorities were read, to the effect that an appeal might be taken before a final judgment or decree was entered, show that appeals in those states may be taken from interlocutory judgments or decrees, which not being the case under our code, they fail on application: See Freeman on Partition, secs. 519, 527.

But to return: Among the ordinances of rules adopted by Lord-Chancellor Bacon "for the better and more regular administration of justice" was one which provided that where a person "comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance, or privity of the court, there regularly the decree bindeth." Chancellor Kent said that a "*lis pendens* duly prosecuted, and not conclusive, is notice to a purchaser so as to affect and bind his interest by the decree." Strictly speaking, however, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. "It affects him," said Lord-Chancellor Cranworth, "not because it amounts to notice, but because the law does not allow litigant parties to give

to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. . . . The necessities of mankind require that the decision of the court shall be binding, not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice pending proceedings. If this were not so, there could be no certainty that litigation would ever come to an end": *Bellamy v. Sabine*, 1 De Gex & J. 566. The main purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgments or decree. Hence the general proposition, that one who purchases of either party to the suit the subject-matter of the litigation after the court has acquired jurisdiction is bound by the judgment or decree, whether he purchased for a valuable consideration or not, and without any express or implied notice in point of fact, is sustained by many authorities, and disputed by none: *Eyster v. Gaff*, 91 U. S. 521; *Grant v. Bennett*, 96 Ill. 513; *Randall v. Lowe*, 98 Ind. 261; *Daniels v. Henderson*, 49 Cal. 242; *Blanchard v. Ware*, 43 Iowa, 530; *Carr v. Lewis*, 15 Mo. App. 551; *Currie v. Fowler*, 5 J. J. Marsh. 145; *Hiern v. Mill*, 13 Ves. 120; 1 Story's Eq. Jur., sec. 405.

The doctrine of *lis pendens* was introduced in analogy to the rule at common law in a real action, "where, if the defendant aliens after pendency of the writ, the judgment in the action will overreach such alienation": *Sorrie v. Carpenter*, 2 P. Wms. 482. And this may account for the leaning in some of the courts to restrict the application of the rule of *lis pendens* to actions or suits affecting title to real property: *McLaurine v. Munroe*, 30 Mo. 469; *Winston v. Westfeldt*, 22 Ala. 760; 58 Am. Dec. 278; *Baldwin v. Love*, 2 J. J. Marsh. 489; *Murray v. Settleburn*, 2 Johns. Ch. 441. But it is hardly considered well settled that it may not with equal propriety be applied to the sales of chattels. Two things, however, seem indispensable to give it effect: 1. That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit "must be so pointed out by the proceeding as to warn the whole world that they intermeddle at their peril": Freeman on Judgments, secs. 196, 197.

Now, the divorce suit of the plaintiff was not brought specifically to recover the one third of the real estate of her husband, as was decreed in the divorce proceeding. The land was not the subject-matter of the litigation, and the subject of the suit was not to recover title that belonged to the plaintiff. It was incidental and collateral to the divorce proceeding. The court has no jurisdiction to affect the title of the husband to his lands, or decree that one third of them shall be set apart for her in her own right and title, independent of a decree for divorce. Nor has the plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for divorce.

A proceeding in divorce is partly *in personam* and partly *in rem*; and in so far as it is to affect the marriage *status*, it is to change a thing independent of the parties, and is a proceeding, not against the parties *in personam*, but against their *status in rem*: Am. & Eng. Ency. of Law, tit. Divorce, 751. The matter upon which the jurisdiction acts is the *status*; the marriage is the thing which the suit is brought to dissolve,—it is the subject of the litigation,—but as incidental to it, the court may grant temporary alimony *pendente lite*, or permanent alimony when a decree for divorce is rendered. And the general rule is, that bills for alimony do not bind the property of the defendant with *lis pendens*: 1 Story's Eq. Jur., sec. 196; *Brightman v. Brightman*, 1 R. I. 112; *Isler v. Brown*, 66 N. C. 556; *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781.

But the court cannot affect the title of the real property of the defendant in a divorce proceeding until the point is reached that a decree of divorce is to be rendered. Temporary alimony may be granted *pendente lite*, but the title of the real estate of the defendant remains intact, and cannot be affected during the pendency of the proceeding, but only when the proceeding for a divorce has terminated, and a decree rendered that the marriage is dissolved, and then only by force of the statute.

Our statute provides: "Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part in his or her undivided right in fee of the whole of the real estate owned by the other at the time of such decree; and it . . . shall be the duty of the court to enter a decree in accordance with this provision": Code, sec. 499.

It is "whenever a marriage shall be declared dissolved" that the statute operates, — not before, or *pendente lite*, — and the court then becomes authorized and it is its "duty" "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "owned by the defendant at the time of such decree" for a divorce.

It must be manifest, then, that the primary object of the suit is to affect the marriage relation, — its *status*, — that it is the specific matter in controversy to be affected, and that it is only when the *status* is changed by a decree of divorce that the statute operates to divest title "owned" by the defendants, and that it then becomes the duty of the court to enter a decree in accordance with its provisions. Nor do the cases cited by counsel sustain his contention. In *Tolerton v. Willard*, 30 Ohio St. 586, the suit was of "double aspect," as said by the court, and was brought to protect her equitable right in property which was the subject of dispute. This property was bought with the wife's money, and she sought a restoration of her rights. The court says: "It is evident that the court, in coming to its conclusion, did take these equities into consideration, so that the decree may fairly be considered an equitable one in her favor." And again: "In a proceeding like the one under consideration, where the wife claims rights in her husband's property other than those arising from the marital relation, and insists upon them in connection with her claim for alimony, the court is fully authorized to pass upon them."

In *Daniel v. Hodges*, 87 N. C. 97, the proceeding was for alimony, and the only property which the husband owned was a lot that the wife sought to have subjected to her claim, and was in actual possession of it by order of the court, when her husband, pending the litigation, conveyed it to another, and the court held, under the exceptional circumstances of the case, that the doctrine of *lis pendens* applied. There the proceeding was to subject the specific thing to her claim, which the husband attempted to defeat by conveying away the property, and the court, while admitting the general doctrine that a *lis pendens* was not applicable in such cases, said: "We are of the opinion the petition for alimony, under the particular circumstances of the case, constituted such a *lis pendens* as affected the purchaser with notice, independent of the actual notice had," and rendered the deeds void. But this has no relevancy to the case at bar. There she sought to subject the property to her claim for alimony, and the suit was directed

specifically against it, and she was put in actual possession by order of the court; and then it was only "under the peculiar circumstances of the case" that the court thought the purchaser from the husband pending the litigation was affected with the rule of *lis pendens*. Here there was no alienation of the property, which was only incidentally involved, or any charge of any act on the part of the defendant Houston to defeat any right whatever which might accrue to the plaintiff if the marriage should be dissolved. If the defendant Houston had conveyed away the property to another with the object of defeating her right, upon a decree for divorce, to any interest in his lands, such purchaser may be affected with the rule of *lis pendens* in such case; but that is not the question here, and which it will be time enough to decide when properly presented for our consideration. The debt which the defendant Houston owed the defendant Timmerman was contracted long before the suit for divorce was commenced, or the cause or ground of the divorce existed, and doubtless the credit was given on the faith of the property, a part of which included the property in dispute, then owned by Houston. There is no pretense of any fraud or collusion, or that the debt is not an honest obligation which Houston ought to have paid long before the divorce proceeding was instituted. Although the commencement of the divorce suit might result in a decree which would affect the property of the defendant, the property was not the subject specifically of the litigation, and by reason thereof was not withdrawn from such burdens as might be legally imposed upon it for just claims upon judgments recovered and docketed against its owner prior to divesting him of his title by force of the statute under the decree. The defendant Timmerman had the legal right to commence her action to recover the money due on the note of Houston, and the fact that the wife of Houston had instituted proceedings for a divorce did not affect that right, but when judgment was recovered thereon, and docketed by force of law, the lands then owned by him in that county, including the land in dispute, became subject to the lien of such judgment; and as the facts show that this was before any decree was rendered in the divorce whereby title to such lands could be divested, it follows that whoever took title from him subsequently, either by contract or by operation of law, took said title *cum onere*, or subject to the lien of such judgment. It results, as a purchaser of said lands at an execution sale upon such judgment,

the defendant Timmerman was not affected by or subject to the rule of *lis pendens*, and her deed thereby rendered invalid. It is true, in the divorce suit, the property was described in the complaint and decree, which, since the decision in *Bamford v. Bamford*, 4 Or. 30, has been deemed essential to reach the property of the guilty party, but it is apprehended that neither allegation or proof concerning the lands is necessary, but that it is enough, and a sufficient compliance with the latter clause of section 499 of the Oregon Code, to say, in effect, that the party obtaining the divorce is hereby entitled to one third of the real property owned by the other, whatever it may be.

In this view, if any question arises as to what property was so owned by him, it can be determined by appropriate proceedings for that purpose between the parties interested much better than in a divorce suit, in which it is neither proper nor convenient that third parties, in order to protect their rights, should be compelled to intervene and become parties to a controversy between husband and wife in a divorce proceeding: *Barrett v. Failing*, 6 Saw. 475. So that, however we look at the facts of this record, our conclusion is, that the decree of the lower court must be reversed, and it is so ordered.

LIS PENDENS. — As to the general doctrine of *lis pendens*, see *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760, and note 765; *Shelton v. Johnson*, 4 Sneed, 672; 70 Am. Dec. 265; *Clark v. Farrow*, 10 B. Mon. 446; 52 Am. Dec. 552; *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 106; *Powell v. Williams*, 14 Ala. 476; 48 Am. Dec. 105; *Murray v. Blutchford*, 1 Wend. 583; 19 Am. Dec. 537; *Jackson v. Andrews*, 7 Wend. 152; 22 Am. Dec. 574; *Henderson v. Pickett*, 4 T. B. Mon. 54; 16 Am. Dec. 130.

LIS PENDENS. — The doctrine of *lis pendens* is not restricted to real actions, but is applicable to choses in action, other than commercial paper which has not yet matured: *Diamond v. Lawrence County*, 37 Pa. St. 353; 78 Am. Dec. 429; *Kellogg v. Fancher*, 23 Wis. 21; 99 Am. Dec. 96; *Winston v. Westfeldt*, 22 Ala. 760; 53 Am. Dec. 278; *Mims v. West*, 38 Ga. 18; 95 Am. Dec. 379.

DIVORCE — ALIMONY — RECENT CASES UPON THIS SUBJECT. — Alimony may be allowed to a wife after a decree for divorce has been rendered against her: *Brigham v. Brigham*, 147 Mass. 159. In a divorce suit, it is within the discretion of the court to separate the issue as to alimony and divorce, or to try them both together: *Pauly v. Pauly*, 69 Wis. 419. A wife may sue for alimony where there exists a *bona fide* state of separation between husband and wife, even though no action for divorce is pending: *Glass v. Wynn*, 76 Ga. 319. And it is always proper, when the circumstances of the wife demand it, to apply for alimony pending an action for divorce: *Cowan v. Cowan*, 10 Col. 540; *Ex parte Ambrose*, 72 Cal. 398. In Georgia, it has been held that until an action for divorce is pending the judge at chambers has no jurisdiction to grant alimony: *Yoemans v. Yoemans*, 77 Ga. 124. One who is suing *in forma pauperis* may be decreed not a pauper by a court of equity, and ordered to pay alimony to his wife: *Moon v. Moon*, 43 N. J. Eq. 403.

WHITNEY v. BLACKBURN.

[17 OREGON, 564.]

ELECTIONS. — PURPOSE OF CONTESTED ELECTION LAWS IS TO INSURE SPEEDY TRIAL, so that the official term which is in dispute may not expire either in whole or in large part before the final determination is reached, and that the will of the people in the choice of public officers may not be defeated.

ELECTIONS. — NOTICE OF CONTEST IS FOUNDATION OF SUIT TO CONTEST ELECTION, and serves the double office of both summons and complaint, and should contain the title of the cause, specifying the name of the court and the names of the parties to the suit, and it must be served and filed within thirty days, according to the practice under section 2544 of the Oregon Code.

PROCESS. — SERVICE OF PROCESS UPON LEGAL HOLIDAY IS IRREGULAR, and may be pleaded in abatement, or set aside on motion. But a notice of election contest, like a summons, is not technically "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time.

ELECTIONS. — IN PROCEEDING TO CONTEST ELECTION, NOTICE OF CONTEST SUPPLIES PLACE OF COMPLAINT in an ordinary action. The facts or combination of facts which give rise to the right of contest are to be briefly stated in the notice of contest, and this necessarily implies that they shall be stated sufficiently plain as to advise the defendant of the "cause" for which his election is contested. Certainty is required, but not technical precision of averment; and when the words used, taken in their ordinary sense, fairly serve to inform the adverse party of the substance of the facts relied upon to defeat his claim, it is sufficient.

ELECTIONS — CONSTRUCTION OF STATUTES RELATING TO CONTESTED ELECTIONS. — Such statutes should be liberally construed by the courts, so that the rights of the people may be preserved, and that no protection may be afforded to fraud; yet one who undertakes to contest the right of another to an office to which such other has been declared elected, by a tribunal chosen by the people, ought to have some well-defined "cause," and to be able to state it with sufficient certainty as to notify or inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry.

J. J. Whitney, by himself.

D. R. N. Blackburn, by himself.

LORD, J. This was a proceeding begun under title 4, chapter 14, sections 2544-2548, Oregon Code, to contest the right of the defendant to the office of county judge of Linn County, to which he was declared elected by the board of canvassers.

The election was held on the fourth day of June, 1888, and the notice was served on the fourth day of July, 1888, by the sheriff of that county, but the notice of such contest was not

filed in court until the twenty-third day of August, 1888, and the next regular term of the court beginning on the twenty-second day of October, 1888, was the time named in the notice for hearing such contest. On the first day of such term, the defendant filed a motion to dismiss the same for the following reasons: 1. The court has not obtained jurisdiction of said contest, or of the person of respondent; 2. Said notice is not entitled in any court; 3. It is not entitled in any proceeding, nor are there any parties thereto; 4. It has not been served on respondent in the manner and within the time prescribed by law; 5. No notice of contest has been legally served on respondents; 6. Said pretended service is illegal; 7. Said pretended notice and the pretended service thereof were not filed in this court within the time prescribed by law; 8. No complaint or other paper has been filed which respondent could be called upon to answer. The court sustained the motion, and dismissed the notice of contest.

It appears that no leave was asked to amend or to serve an amended notice, presumably for the reason that the plaintiff considered the ruling of the court as error, which he would be able to establish on appeal.

Our statute provides as follows: "Any person wishing to contest an election of any person to any county, district, township, or precinct office, may give notice in writing to the person whose election he intends to contest, that his election will be contested, stating the cause of such contest briefly, within thirty days from the time said person shall claim to have been elected": Oregon Code, sec. 2544.

It will be noted that the provision is silent as to the time when the notice of contest shall be filed.

The defendant contends that the notice must not only be served, but must also be filed within thirty days. It was not filed until the twenty-third day of August, nearly fifty days thereafter.

By reference to the cases decided in this court, the practice has been to file the notice within thirty days, and such undoubtedly has been the construction given to the statute by the profession.

In Minnesota there was a like statute, and from which it is supposed our statute was taken, although it may have been from some other state, and the only construction which the courts of that state has ever given to the provision (sec. 2544) just cited, which has been brought to our observation, is found

in *Waller v. Bancroft*, 4 Minn. 110, wherein Flandrau, J., said: "This proceeding is instituted by the service of a notice by the party desiring to contest, upon the party in possession, within thirty days after the election."

No mention is made when the notice must be filed, yet certainly it must be done within such time as will afford a speedy trial, and carry into effect the will of the people. The "proceeding is instituted," that is, begun, by service of notice of contest, but it is not pending in court until filed.

In a proceeding of this kind, the notice serves the double purpose of a summons and complaint. A petition or complaint, as soon as filed, is pending (*Clindenin v. Allen*, 4 N. H. 387), and the word "pending" implies that the cause is in court: *Thomas v. Hopkins*, 2 Browne, 146. Until filed, there was no contest pending in the court; but there was notice that the plaintiff intended to bring the defendant before the court, at a time stated therein, for the trial of the allegations contained in the notice of contest. That the notice must be filed before that time as specified is not disputed, but the contention is, that the true construction of the provision, alike supported by analogy and the manifest object of the law, requires that the notice must be filed within thirty days.

At common law, the original writ contained a general description of the declaration, and by practice in some of the states the declaration was fully set forth in the writ which issued out of the court, properly attested, and was returnable to it. It was a mandatory precept, issued by the authority of, and in the name of, the sovereign or state, for the purpose of compelling the appearance of the defendant before the court to which it was returnable, that he may there make an answer to the plaintiff's complaint: Gould's Pleading, 14.

In some respects, the notice of contest is like such writ, for it specifies or sets forth the causes of action, and serves the purpose of a summons to give notice of the intended contest; but it is not an official paper like the writ, issued out of the court, or attested by any of its officers, and it does not seem to me to be entitled to have the character of an official paper, or to be considered as a cause of action pending in court, until such notice is filed.

In many of the states, in proceedings of this nature, the statutes provide that the notice or petition, or other statement required, must be filed within the time prescribed, and, by analogy to the practice under the code, which requires the

complaint to be filed, etc., more especially as the notice of contest serves the double purpose of a complaint and summons, it would seem to be the better practice, and more in conformity with its usages, to require the notice to be first filed, and then delivered to the proper officer for service, which would necessarily exact that it be filed within thirty days. But this has not been the uniform practice; usually the notice is served first, or before filing, but the practice has been, and the record of all the cases show, that the notice has been filed within thirty days. So that, if this section is to be construed according to the practice under it, the analogies which sustain it, and the evident purpose of the law to secure a speedy trial, which necessarily demands promptness in commencing and prosecuting the proceedings, then the notice must be filed within thirty days. It certainly was not intended that a contestant should be permitted to cause a notice to be served on the party in possession, and then to pocket or hold back the notice for any length of time he may desire, or suits his whim, or to afford him time to skirmish around to find evidence to support his allegations. There must be some limit within which this notice must be filed; and if not within the time allowed to serve the notice, what limit?

If he may keep the notice back fifty days, why not a year, or during the term?

In providing that the judge may sit at chambers and try the contest, it becomes plain that the purpose of the law is to insure a speedy trial, to the end that the choice of the people legally expressed may prevail, and in recognition of this principle, it is the practice of the courts as it is their duty "to speed the cause, so that the official term which is in dispute may not expire either in whole or in large part before the final determination is reached." Until the notice is filed, and the cause is pending in court, the defendant is helpless to do anything in the premises; but is he to be annoyed and menaced by a threatened contest until it shall please the plaintiff to file his notice of contest? What reason is there, when the notice is served, that it should not then be filed? Why keep it back? The cause of contest is stated in it, and no possible injury can come to the plaintiff by filing it, under our system of allowing amendments, and the liberal construction given by the courts to contested election laws in order that the will of the people in the choice of public officers may not be defeated.

What reason then can be given for delaying the inquiry until it shall suit the volition of the plaintiff to file his notice. It is not simply a matter of his own private concern, but a matter in which the people have a preponderating interest, and it is their right as well as his duty, when he charges that another holds an office to which he claims to have been elected, to have it speedily determined, and when such is the manifest intention of the law, it will be so construed as to give it that effect. As the result, it follows that our opinion is, that the notice must be served and filed within thirty days; but as this objection is now first raised, and as there are others, which would necessarily lead us to the same conclusion which the court below reached, we shall pass this objection with these suggestions for future guidance in such proceedings.

As the notice is the foundation of the action in a proceeding of this kind, and serves the double purpose of both summons and complaint, it should contain "the title of the cause, specifying the name of the court and the names of the parties to the action, plaintiff and defendant" (Oregon Code, sec. 66, subd. 1); and "a demand for the relief which the plaintiff claims" (Id., sec. 66, subd. 3); and perhaps ought to be verified to insure good faith in the averments. Usually this has been the practice; but we are not prepared to say that a verification of the notice of contest is an absolute requirement. But certainly a notice of contest which is a writ containing the declaration, so to speak, ought to specify the name of the court in which the defendant is to appear, and the names of the parties.

The code makes the title of the case a part of the complaint, and as the notice of contest embodies the idea of both summons and complaint, the absence of these requirements is a ground of objection, which, when made, will prevail, unless leave to amend is asked for. The notice in the case at bar is without title,—it does not specify the name of the court or the parties, and asks for no relief, nor is it verified. It is simply addressed to D. R. N. Blackburn, without any caption; and although these objections were pointed out, and the plaintiff could have applied to the court for leave to amend, he chose not to do it, and there was no other alternative for the court than to grant the motion to dismiss. Again, the notice was served on the defendant on the fourth day of July, 1888, a legal holiday (Oregon Code, sec. 3543), which is made a non-judicial day by section 923 of the code. But the expres-

sion "legal holiday" of itself imports a *dies non juridicus*: *Lampe v. Manning*, 38 Wis. 673; and "this," said Rodney, J., "means only that process cannot ordinarily issue, or be executed or returned, and that courts do not usually sit on that day: *State v. Ricketts*, 74 N. C. 193; *San Francisco v. McCain*, 50 Cal. 211. It would seem, then, that service of process upon a legal holiday is clearly irregular, and may be pleaded in abatement, or set aside on motion": *Wade on Notice*, sec. 1359; *Cooner v. Jackson*, 50 Ala. 384.

Upon the assumption that the notice of contest is a process as contended, the service was irregular, and was subject to be set aside on motion. Undoubtedly, one object of the notice of contest, like a summons, is designed to impart notice to the defendant, but it is doubtful whether it may be considered process in the technical sense, when even a summons is not process in the sense that requires it to run in the name of the state: *Bailey v. Williams*, 6 Or. 71.

Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under our code, the summons is the process used to commence a civil action, but technically such a summons is not "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. In view of this distinction, the notice cannot be considered "process" in the sense in which that word is used in the books.

It is further objected that the notice or paper filed is not such as calls upon or requires the defendant to answer it, and several reasons are assigned therefor. There is no question but that the notice, or the complaint part of it, is singularly defective, and omits much that is essential and indispensable to be alleged. Nor is the cause of such contest sufficiently or otherwise stated, so as to apprise the adverse party of the grounds of such contest, and enable him to be prepared to meet them. In a proceeding of this kind, the notice of contest supplies the place of a complaint in an ordinary action. The code requires that the complaint should contain a plain and concise statement of the facts, and a demand for the relief claimed: Oregon Code, sec. 66. The statute for contested election requires that the person wishing to contest "may give notice in writing to the person whose election he intends to

contest that his election will be contested, stating the cause of such contest briefly," etc. The "cause" of such contest is his cause of action,—the wrong committed. It is the fact or combination of facts which give rise to his right of contest or of action, as the case may be. In the complaint these are to be plainly and concisely stated, and in the notice briefly stated. But in either case the facts must be stated. To state them briefly necessarily implies that they shall be stated sufficiently plain as to advise the defendant of the "cause" for which his election is contested.

It is no doubt true that upon the question as to the certainty required in stating the ground of a contest, the courts in the different states vary in opinion, but this in some measure may be accounted for by the difference in the statutes and the courts in which such contest is to be tried.

In respect to this phase of the subject, Mr. McCrary says: "Undoubtedly, the same rule should be applied to a pleading of this character that is applied to all other similar pleadings. It should state in a legal, logical form the facts which constitute a ground of complaint; nothing more is required; nothing less will suffice": McCrary on Elections, sec. 405.

In some of the states the rule is to require certainty to a common intent, while in others a much less degree of strictness is required.

In *Election Cases*, 65 Pa. St., Agnew, J., said: "The general rule in all pleadings is, that certainty to a common intent is all that is required: Heard's *Stephen's Pleading*, 380. The early decisions in this city were too stringent."

A much truer exposition of the law, and one to be adhered to, is found in the opinion of the late Judge Thompson, in *Mann v. Cassidy*, 1 Brewst. 26, 27. As remarked by him: "The rule must not be held so strictly as to afford protection to fraud by which the will of the people will be set at naught, nor so loosely as to permit the acts of sworn officers, chosen by the people, to be inquired into without adequate and well-defined cause." An interesting note upon this subject may be found in the *Am. & Eng. Ency. of Law*, 406.

Under our statute, by its meaning as well as by parity of reasoning, "stating the cause of such contest briefly" means stating the facts which give rise to the right to contest, or constituting the grounds of such contest. To do this briefly, certainty is required, but not technical precision of averment, and only that degree of certainty in the statement of facts as will

serve to notify the adverse party of the particular cause upon which the contest is founded.

As the object of the notice is to inform the other party of the substance of the facts relied upon to defeat his claim, when the words used therein taken in their ordinary sense fairly serve this purpose, it is sufficient.

In the case at bar, the learned counsel, while not wholly ignoring some of the defects pointed out in the notice, sought mainly to uphold it upon the authority of *Howard v. Shields*, 16 Ohio St. 186, and waiving any expression of opinion as to the applicability of the view therein expressed to our statute, a glance at the statement of facts in that case as a test for the case here would be fatal to its sufficiency in many particulars.

The notice of contest in the case at bar proceeds in this wise:—

“NOTICE OF CONTEST OF ELECTION.

“To D. R. N. BLACKBURN: You are hereby notified that your election to the office of county judge of Linn County, Oregon, at the regular June election for the year 1888, in said county and state, will be contested by me for the following reasons:—

“1. A great number, to wit, the number of twenty-five or more, illegal votes were cast and counted for you for said office at said election, in each of the precincts of said county; the names of said voters being unknown to me at this time. Particular specification of the names of said voters I am unable to give, for the reason I have as yet had no time or opportunity to examine the poll-books, or ballots cast at said election.

“2. A great many, to wit, the number of twenty-five or more, of legal votes were offered for me at said election in each of the precincts of said county for said office, and the judges of election excluded said votes, and refused to receive or count the same for me; the names of said voters being unknown to me at this time. A more particular specification and description of the names of said voters I am unable to give, for the reason I have as yet had no time or opportunity to examine the poll-books, or ballots cast at said election.

“3. A great number, to wit, twenty-five or more, votes were counted for you for said office at said election in each of the precincts of the said county, which were not cast for you; the names of the persons casting said votes being unknown to me at this time. A more particular specification of the names

of said voters I am at this time unable to give, for the reason I have as yet no time or opportunity to examine the poll-books, or ballots cast at said election," etc.

Without encumbering the record further, it is enough to say that the notice of contest continues to run without abatement to the extent of fourteen counts with the same dead uniformity of general statement, and ends without even a prayer for relief. Nor does it appear by the notice that the plaintiff or contestant was an elector or resident of said county or even a candidate for the office except by inference, although this last may be immaterial: *Howard v. Shields*, 16 Ohio St. 136; *Rounds v. Smart*, 71 Me. 380; *Wilson v. Lucas*, 43 Mo. 292; *State v. Peniston*, 2 Neb. 100; *State v. Long*, 91 Ind. 351. Nor that the illegalities so numerous and uniformly charged would have affected the result, or that the contestant received a plurality or majority of the legal votes cast for the office: *Harris v. Loomis*, 6 W. Va. 713; *Zerby v. Snare*, 107 Pa. St. 183; *State v. Mason*, 14 La. Ann. 505; *Halstead v. Bader*, 27 W. Va. 306; *Lamer v. Gallatas*, 13 La. Ann. 175; *Sweepstor v. Barton*, 39 Ark. 557. Nor is there anything in the notice to show that the defendant was a candidate for county judge, or that he was declared elected as such, or that he received a certificate of election, or that he did not receive a majority or plurality of the legal votes actually cast, or that he was not duly and legally elected and entitled to the office. All to be found, except the counts as stated, is the opening statement that the defendant was elected at the regular June election in 1888, and that he intended to contest it. From the facts as set forth, it is manifest that they are not even reasonably or otherwise specific and certain, and that no one could be prepared to meet charges preferred in such a general way, or if any irregularity or illegality in fact did lie concealed behind them, to avoid being taken by surprise. The wording of the notice indicates, as was asserted at the argument, that the plaintiff did not know of a single error or illegal vote cast, but stated the facts broadly and generally because he was unable to point out, or to be reasonably specific and certain as to any count in his notice, or as to any irregularity or illegality of whatever kind, upon which to rely, or other fact to sustain his claim. As the plaintiff insisted, by his conduct as disclosed by this record, in standing by his notice as it was, it is difficult to perceive, in view of all the facts, how the court could do otherwise than sustain the motion

While it is the duty of courts to disregard mere technical rules or defects, and to liberally construe the law that the rights of the people may be preserved, and that no protection may be afforded to fraud, yet he who undertakes to contest the right of another to an office to which he has been declared to be elected, by a tribunal chosen by the people, ought to have some well-defined "cause," and to be able to state it with sufficient certainty as to notify or inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry.

The judgment must be affirmed.

ELECTIONS. — FOR THE LAW APPLICABLE TO ELECTION CONTEST CASES, compare the recent cases: *Kreitz v. Behrensmeier*, 125 Ill. 141; 8 Am. St. Rep. 349, and note; *Hartman v. Young*, 17 Or. 150; *ante*, p. 787, and note 798; *De Berry v. Nicholson*, 102 N. C. 465; *ante*, p. 767, and note 776; *Fenton v. Scott*, 17 Or. 189; *ante*, p. 801, and note 808.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

TOWNSHIP OF PLYMOUTH v. GRAVER.

[125 PENNSYLVANIA STATE, 24.]

HIGHWAYS. — OBJECT OF PUBLIC ROAD IS TO AFFORD EASY, CONVENIENT, AND REASONABLY SAFE MEANS OF PASSAGE for persons traveling thereon, with horses, wagons, etc., and the duty of the township is, as far as practicable, to do what is reasonably necessary to secure that object, having reference to the kind of road, its peculiar location, its adjacency to places of peril, and the amount and kind of travel it accommodates.

HIGHWAYS. — GENERAL RULE IS, THAT TOWNSHIP IS NOT RESPONSIBLE FOR CONDITION OF SURFACE of land outside the limits of the highway, nor is it bound to fence the road merely to prevent travelers from straying out of the path; but it is liable for injuries to a traveler on the road, caused jointly by a defect therein and a defect in the adjoining premises, if the defect in the road was the proximate cause of the injury.

HIGHWAYS. — TOWNSHIP IS HELD TO DO WHATEVER IS REASONABLE AND PRACTICABLE TO AVERT THREATENED DANGER TO TRAVELER, where such danger arises from an imperfection in the highway itself, from an excavation in it outside the traveled route, from the existence of a delivory or a stream of water at the roadside, or from a railroad upon which locomotives and trains are accustomed to pass, if there be a concurrence of circumstances which renders the road a place of peril.

HIGHWAYS. — WHETHER DANGEROUS PLACE, NOT WITHIN HIGHWAY, BUT ADJACENT TO OR NEAR IT, is in such close proximity to the highway as to render its use unsafe for public travel, is a matter to be submitted to the judgment and experience of the jury upon a consideration of all the facts respecting it.

HIGHWAYS. — DAMAGES FOR INJURY CAUSED BY DEFECTIVE HIGHWAY. — The plaintiff prevailing in an action against a township, brought to recover for an injury sustained by reason of a perilous highway, is not entitled to recover interest, as such, upon the amount the jury might ascertain his damages to have been; but in fixing upon the amount of the verdict, they may consider the time which has elapsed since the injury was received.

ACTION in case brought by L. K. Graver against Plymouth township to recover damages for the loss of a horse, struck and killed by a train of the Plymouth Railroad Company. A township road ran for a distance parallel with and immediately adjacent to said company's line, with no fence or barrier between them, the highway being about on a grade with the railroad track. An employee of the plaintiff had charge of the latter's horse, and was driving it on the highway at the place mentioned, when the horse became unmanageable by reason of fright at a passing train, and, plunging from side to side, was struck by a car near the middle of the train, and instantly killed. There was testimony on the part of the defendant that when the driver first saw the approaching train he was warned not to proceed until the train passed, but he drove on. Among other things, the jury were instructed that if they found the plaintiff entitled to recover the value of his horse, they should allow him interest from the time the horse was killed. The jury found a verdict for the plaintiff, and judgment having been entered thereon, the defendant assigned error.

Charles S. Stinson, for the plaintiff in error.

Charles Hunsicker, for the defendant in error.

CLARK, J. The duties of the supervisors, in the opening and repair of the public roads, are defined by statute. The sixth section of the act of 1836 provides that the public roads shall be effectually opened and constantly kept in repair, and at all seasons shall be kept clear of all impediments to easy and convenient passing and traveling, at the expense of the township, as the law shall direct. For any willful or wanton failure to discharge these duties, the supervisors are personally liable, and the township is responsible in damages to those who suffer injury from their neglect: *Dean v. New Milford Township*, 5 Watts & S. 545. The liability of the township is commensurate with the duty, and hence in each case the inquiry is as to the extent of the duty enjoined by law.

The degree of care which is required of road supervisors has no exact legal standard; the law does not impose any absolute liability for every insufficiency of a road, or for every impediment to easy and convenient travel; they are required to do what is practicable to be done, and to preserve a reasonable condition of safety, with reference to the kind of road, its peculiar location, its adjacency to places of peril, and the

amount and kind of travel it accommodates. It may be said, generally, that they are bound for reasonable and ordinary care, according to the circumstances. Where no danger may be anticipated, or the peril is but slight, a less degree of vigilance will suffice than where the danger is manifest: *Turnpike Co. v. Railroad Co.*, 54 Pa. St. 350. The object of a public road is to afford an easy, convenient, and reasonably safe means of passage for persons traveling thereon, with horses, wagons, etc., and the duty of the supervisor is, as far as practicable, to do what is reasonably necessary to secure that object.

It is contended that the road in question in this case was, at the time of the occurrence complained of, in good repair; that it was in no way obstructed, and that as the horse took fright at the locomotive, and was killed by the cars, outside of the limits of the road, the township cannot be held for the consequences. But, granting that there was no physical obstruction or defect in the road, was there any other impediment to easy and convenient travel upon it? It is said that the passage over it with horses and wagons was not safe; that it was located along and immediately adjacent to the track of the railroad, and that the effect of the passage of locomotives and cars on the railroad, at high rates of speed, in such near proximity to the road, was to frighten horses, in many cases to make them unmanageable, and that, in the absence of barriers erected for the protection of the public, the place was so dangerous that travelers were exposed to the utmost peril. It is argued that as there was a fence along the road, on the farther side from the railroad, and none between the road and the railroad, a horse, in attempting to escape from the object of its fright, was liable to turn onto the railroad, and that, anticipating the results likely to ensue, it was the duty of the supervisors to erect suitable barriers between the road and the railroad at this point.

It is certainly true, as a general rule, that the supervisors are in no way responsible for the condition of the surface of the land outside the limits of the road, nor are they bound to fence the road merely to prevent the traveler from straying out of the path; but they are liable for injuries to a traveler on the road, caused jointly by a defect in the road and a defect in the adjoining premises, provided of course the defect in the road was the proximate cause of the injury: *Burrell Township v. Uncapher*, 117 Pa. St. 353; *Shearman and Redfield on Neg-*

ligence, 347. It is equally true that supervisors are not bound to furnish roads upon which it will be safe for horses to run away. They are bound, however, to furnish roads that are reasonably safe; if they do not, and a traveler is injured in consequence of culpable defects therein, it is no defense that the horse, at the exact time of the injury, was running away, or was beyond his control: *Ring v. Cohoes*, 77 N. Y. 83; 33 Am. Rep. 574; Shearman and Redfield on Negligence, 346, and cases there cited.

There may be such a state of things, however, at a particular place as will require the erection of a barrier in order to secure a reasonable degree of safety for public travel. In *Lower Macungie Township v. Merkhoffer*, 71 Pa. St. 276, there was a precipitous bank in the roadside, caused by an excavation made in mining, and although the road was wide enough, under ordinary circumstances, and was otherwise in good repair, it was held, as matter of law, to be the duty of the supervisors to guard against danger, by erecting a barrier along the margin of the road, so that persons might not, in the night-time, or by the fright or shying of a horse, be thrown over the bank.

In general, however, whether a dangerous place, not within the highway but adjacent to or near it, is so near as to make travel unsafe, is a matter for the jury: *Warner v. Holyoke*, 112 Mass. 362. The question is, whether or not the dangerous place is in such close proximity to the highway, as traveled and used, as to render the use of the highway unsafe. The decision of such a question is most appropriately made by submission of it to the practical judgment and experience of a jury upon a consideration of all the proofs respecting it. This rule, as applied to bridges, is illustrated in the case of *Newlin Township v. Davis*, 77 Pa. St. 317. In that case, the negligence alleged was the failure of the road supervisors to provide barriers or side-rails to a bridge across the Brandywine. The bridge formed part of the public road; there were no side-rails; and the evidence showed that whilst the horse was being driven across the bridge, he frightened at a piece of plank nailed over a hole in the floor, commenced backing, and before he could be prevented, backed over the bridge into the creek, and the horse, harness, and carriage were injured. The question of negligence was submitted to the jury, under instructions that it was the duty of the township to keep the bridge as safe, considering all the circumstances, as it was reasonably practi-

cable to make it, and that it was for them to decide whether the bridge was defective or not, in not having been provided with railings. The jury found for the plaintiff, and compensated him for the injury.

In *Burrell Township v. Uncapher*, 117 Pa. St. 353, a horse and wagon were being driven down a hillside road. At the right side of the road coming down the grade was a steep declivity, unguarded by barriers. Arriving at a point near the foot of the hill, the horse suddenly took fright at a steam-thrasher standing at the roadside, and sprang to the right, partly over the declivity; becoming altogether unmanageable, he made a second plunge, and went over the precipice, overturning the wagon, and injuring the persons therein. The opinion of the court in that case was delivered by our brother Green, who said: "The immediately producing cause of the accident, in the present case, was the unguarded condition of the roadside at the place where the accident occurred. If that unguarded condition of the roadside was an act of negligence on the part of the defendant, it follows that the defendant is responsible. Whether it was negligence to maintain the road at the place in question without some kind of protection, was a question of pure fact, which it was the province of the jury alone to determine," etc.

The case of *Hey v. Philadelphia*, 81 Pa. St. 44, 22 Am. Rep. 733, is, we think, identical in principle with the case now under consideration. The action was brought against the city for negligence in not sufficiently guarding one of the roads in the public park, by reason of which the plaintiff's horse, being frightened at a passing railroad train, fell into the Schuylkill and was drowned. The road was wide and level, and contained no obstruction; the stream was on one side, and a high bank of rocks on the other; the only defect alleged was, that there was no guard erected between the road and the river. The court below submitted the question of negligence to the jury, who found for the plaintiff; but, upon a point reserved, judgment was afterwards entered for the defendant, *non obstante veredicto*. The learned judge below was of opinion that the fright and breaking away of the horse was the immediate cause of the disaster; but this court took a different view of the case, and held that the negligence of the city in not providing a barrier, as found by the jury, was the proximate cause. "If the road is so dangerous," said Mr. Justice Gordon, in the opinion, "by reason of its proximity to

a precipice or any other cause, that common prudence requires extra precaution in order to insure the safety of the traveling public, why shall not the authorities be bound to such precaution?"

When the alleged impediment is a dangerous place outside the highway limits, the questions for the jury are: 1. Whether it is in such close proximity to the road as to render the highway unsafe for travel; and if so, 2. Whether the road supervisors have done what was reasonable and practicable to guard against the danger. The place of danger, if not in the road, must be contiguous to it, or in such proximity as that the danger is practically the same as if it were contiguous.

In the present case, it is conceded that the railroad adjoins the public road; there was no space or barrier between them. The jury has found that it was a place of danger, and that the supervisors were negligent in failing to provide a reasonable protection to travelers against that danger. These, as we understand the case, were proper questions for the jury, and we are concluded by the verdict.

It is contended that, if this be so, the supervisors of roads will be held to erect barriers at all points throughout the state where the public roads are adjacent to, or parallel with, and in close proximity to, railroads. There is no such provision in the law; but it certainly is the law, and it has always been so understood, that whenever a public road is, from any cause, rendered so unsafe as to put the traveler in peril of his life, it is the duty of the supervisors to do what is practicable and reasonable, under all the circumstances, to render it safe; and the facts, in each case, should be submitted to the judgment and experience of the jury. It matters not, we think, whether the danger arises from an imperfection in the road itself, or from an excavation in it outside the traveled route, or from the existence of a declivity or stream of water at the roadside, or from a railroad upon which locomotives and trains of cars are accustomed to pass, if there is a concurrence of circumstances which render the road a place of peril and danger to the traveler, the township is held to do whatever is reasonable and practicable to avert the danger which threatens.

We do not say that they are bound to make the road a safe one; that in many cases would be impracticable. They are bound simply to the exercise of common prudence and of ordi-

nary care and diligence to that end. The jury, upon a consideration of the whole case, has found that the supervisors did not exercise that care and diligence which they should have exercised under the circumstances, and the question, as we have said, was for the jury. If the absence of barriers was a defect in the road, that defect was the proximate cause of the injury. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event, other than the plaintiff's fault, to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time": *Shearman and Redfield on Negligence*, 10; see also *Burrell Township v. Uncapher*, *supra*.

The question of contributory negligence was rightly submitted to the jury, and their finding relieves us from any consideration of that question.

It is true, the plaintiff was not entitled to interest, as such, upon the value of his horse; but in computing the amount of the damages, the jury may consider the time which has elapsed since the injury was received. There is some conflict in the cases: *Pittsburgh R'y Co. v. Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580; *Allegheny v. Campbell*, 107 Pa. St. 530; 52 Am. Rep. 748; but this we think is the rule generally recognized. The instruction of the court in this respect was perhaps not strictly accurate, but the verdict was small and the amount of the interest unimportant. We do not feel that we should disturb the judgment on that ground.

The judgment is affirmed.

HIGHWAYS — WHAT IS. — A road is any piece of land used or appropriated for travel: *Chollar-Potosi M. Co. v. Kennedy*, 3 Nev. 361; 93 Am. Dec. 409.

HIGHWAYS. — Townships are required to keep their highways reasonably safe for public travel, — not absolutely safe: *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note 851, as to the duty of municipalities to keep their streets, highways, etc., in a reasonably safe condition for public travel: *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55, and note 59; *North Mannheim Township v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 650, and note 653; *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and note 450.

STREETS — ADJACENT DANGERS. — A municipality may be liable for not guarding a street from adjacent dangers, which make travel upon the street

hazardous: *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733, and cases cited in the foot-note thereto.

DAMAGES FOR INJURIES — INTEREST. — Interest is not ordinarily recoverable upon unliquidated damages: *Cox v. McLaughlin*, 76 Cal. 60; 9 Am. St. Rep. 164, and note 173; *Coburn v. Goodall*, 72 Cal. 498; 1 Am. St. Rep. 75, and note 83.

HEXTER v. BAST.

[125 PENNSYLVANIA STATE, 52.]

SALES. — WARRANTY, ALTHOUGH COLLATERAL CONTRACT, MUST FORM PART of the transaction involving the sale. If the vendor has possession, no special form of words is necessary to create the warranty, an affirmation at the time of the sale being sufficient, provided the affirmant intended to warrant, and did not express a mere matter of judgment or opinion.

TO SUPPORT ACTION OF DECEIT, PROPERLY SO CALLED, IT MUST APPEAR that the fraudulent representation complained of was untrue, that the defendant knew, or ought to have known, at the time it was made, that it was untrue, and also that it was calculated to induce the plaintiff to act upon it, and that, believing it to be true, he was induced to act accordingly.

DECEIT. — IF ONE IS THROWN OFF HIS GUARD AND DECEIVED BY FALSE AND FRAUDULENT WARRANTY, IT IS SUFFICIENT, to prove the warranty broken, to establish the deceit; for a person will be presumed to know of the existence or non-existence of a fact which he undertakes to warrant.

DECEIT — EVIDENCE. — ASSIGNEE OF MORTGAGE HAS RIGHT OF ACTION IN DECEIT against the assignor, who gave a false certificate at the time of the assignment, that he had not received any payment upon the notes described in the mortgage, except what had been realized upon a sheriff's sale, and the action will lie, although the transfer of the mortgage was without recourse to the assignor in any event whatever. In such action the plaintiff may read in evidence the record of a *scire facias* which he had previously instituted on said mortgage, wherein a judgment was rendered against him, the record including the pleadings, findings of fact, and conclusions of law by the court, for the purpose of showing the particular ground of such judgment against him. And it is also proper to prove a former suit in equity between the plaintiff and defendant, for the purpose of showing that the consideration for the transfer of the mortgage was the release by the plaintiff of his claims in that suit.

ACTION in case brought by Abraham Hexter against Gideon Bast. The defendant having died before trial, his executors were substituted. The plaintiff sought to recover damages for alleged misrepresentation, fraud, and deceit practiced by the deceased upon the plaintiff, at the time he assigned a certain mortgage and notes to the plaintiff without recourse. Said mortgage was executed by William James and his wife, Susanna James, and was assigned to the plaintiff by Bast, in consideration of the settlement of pending litigation in equity

in which the present plaintiff was complainant, and said Bast and others were defendants. Prior to this action, Hexter had sued out a *scire facias* on the mortgage, and failed to recover, because the debt was paid before the assignment to him, and because the mortgage had never been properly acknowledged. Other facts appear in the opinion. The judgment was for the defendants, and the plaintiff assigned error.

George W. Wadlinger, Charles N. Brumm, Seth W. Geer, and James Ryon, for the plaintiff in error.

Guy E. Farquhar, S. H. Kaercher, and John W. Ryon, for the defendants in error.

CLARK, J. This is an action on the case for deceit. Some of the counts in the declaration might perhaps be read as for an injury arising *ex contractu*; but as the plaintiff stated at the trial that the injury complained of arose *ex delicto*, that the original as well as the amended declaration set forth a cause of action in deceit, and the defendants, conforming to that theory of the case, entered a plea of not guilty, we will consider the questions presented as they were presented at the trial in the court below. It would be unfair to the learned judge to do otherwise; for it would appear that it was upon this suggestion of counsel the amended declaration was filed, and the trial conducted as in deceit. The plaintiff having thus indicated to the court his election to consider the counts as for deceit, the cause should be considered as if the pleadings were consistent and the action wholly in that form.

Some of the counts are for deceit, by means of fraudulent misrepresentations, and some upon a fraudulent breach of warranty, and all are based upon the certificate accompanying the transfer of the notes and mortgage, which it is claimed creates an express warranty of the facts therein contained. The plaintiff avers that by means of this warranty, which was false and fraudulent, the defendant in his lifetime sold, and the plaintiff was induced to buy, the securities in question.

This involves the construction, not only of the certificate, but of the various transfers and the release, which, it must be conceded, taken together, constitute a single transaction. A warranty, although a collateral contract, must form part of the transaction involving the sale. If the vendor have the possession, no special form of words is necessary to create it; an affirmation at the time of the sale is sufficient, provided it was so intended. It is enough, if the words used are not equivocal.

cal, and if it appears, from the whole evidence, that the affir-
mant intended to warrant, and did not express a mere matter of
judgment or opinion: *Warren v. Philadelphia Coal Co.*, 83 Pa.
St. 437.

At the time of this transaction Bast gave a certificate, in the
most positive and unequivocal terms, that he had not received
any payment on any of the notes described in the mortgage,
etc., excepting that which was realized at the sheriff's sale,
etc. This is the only warranty alleged; if there was any other,
it was such only as was implied by law, and none such, under
the special facts and circumstances of this case at least, would
be open to the charge of fraud, but would be available only in
some other form of action.

The matters set forth in the certificate were certainly not
the expression of a mere opinion, or of the defendant's judg-
ment, in reference to any matter of which he might or might
not be correctly informed; it was the positive statement of a
fact which was peculiarly, and indeed exclusively, within
his knowledge, and the statement was one upon which Hexter
had a right to rely. That it was intended as a warranty can-
not be questioned; and whether it was, or not, was a question
of law to be determined by the court upon an examination
and construction of the paper. But it must be confined to
the particular matters specified therein; it has no reference,
and contains no statements, as to the proper execution of the
mortgage; nor is there any evidence that the defective ac-
knowledgment of the mortgage was known to Bast. That he
knew his certificate was false, however, is apparent; for
although when called as a witness on the trial of the *scire*
facias he denied having released James and wife, yet he con-
fessed that he purchased the mortgaged premises at the
sheriff's sale for the claim he had against it,—twelve thou-
sand five hundred dollars,—and this is in accord with the
plaintiff's claim in the present case.

It is true, the transfer of the mortgage, which was ad-
mittedly the only available security, was "without recourse
to the said Gideon Bast in any event whatever." These
words have no technical import, perhaps, in the transfer of
non-negotiable instruments; they are important only as they
may indicate the understanding of the parties, that the plain-
tiff should take the mortgage subject to every risk, as well the
solvency of the parties as the validity of the mortgage itself;
but there is no process of reasoning that could extend the

effect of this clause to prevent his liability for the contemporaneous, positive, though fraudulent, representation and warranty that nothing had been paid upon it except as stated.

The general rule is, that to support an action of deceit, properly so called, it must appear that the fraudulent representation complained of was untrue; that the defendant knew, or ought to have known, at the time it was made, that it was untrue; that it was calculated to induce the plaintiff to act upon it, and that, believing it to be true, he was induced to act accordingly: *Cox v. Highley*, 100 Pa. St. 249. As a general rule, the statement must be both false and fraudulent; but if a person take upon himself to state as true that of which he is wholly ignorant, he will, if it be false, incur the same legal responsibility as if he had made the statement with knowledge of its falsity; the fraud consists in representing that he knows that of which he in fact is consciously ignorant. So, too, if a person is thrown off his guard and deceived by a false and fraudulent warranty, it is sufficient, to prove the warranty broken, to establish the deceit: Addison on Torts, 1181; for one will be presumed to know of the existence or non-existence of a fact which he undertakes to warrant.

The first and third assignments of error are to the refusal of the plaintiff's offer to read the record of the action on the *scire facias*. The first embraced the offer of the entire record, including the testimony taken in the cause; and the third embraced only the findings of fact, the conclusions of law, and the judgment entered thereon. The action was in the name of Hexter, to whom the mortgage had been assigned, in the form and manner regulated by statute; Bast had no notice of the proceeding, and had no control over it; he had no right to adduce testimony, or to cross-examine the witnesses, and could not have reviewed the judgment. But the judgment was, notwithstanding this, admissible to show that Hexter had exhausted his legal remedies, and had failed to recover; and we think it was competent for the plaintiff to exhibit the issue formed by the pleadings, in order that it might appear upon what ground the judgment went against him; and if these were too general in form for that purpose, it was proper for him to resort to the findings of fact, the conclusions of law, and the judgment entered thereon. These findings were perhaps not receivable in evidence as proof of the facts stated therein, but they were, without doubt, evidence of the exact and particular ground of the defendant's recovery. If that

trial had been by jury, other methods of proof recognized in our practice would necessarily have been pursued; but the formal findings filed of record certainly furnished the best evidence of this fact of which the case was capable. The general principles upon which this proof was admissible are illustrated in the cases of *Kauffelt v. Leber*, 9 Watts & S. 93; *Follansbee v. Walker*, 74 Pa. St. 306; and many others which might be cited.

It is said that the findings of the court in the previous case were read in the hearing of the jury, in connection with the offer of the judgment, without objection; but even if this were so, their legitimate and proper effect was wholly neutralized in the charge, as will appear by an extract from it, as follows: "The fact, the judgment of the court," says the learned judge, "that he could not recover in that action, is before you, because had he then recovered, he would have no ground of action now; and it is only because he then failed to recover in the proceedings on the mortgage against the property of Mrs. James, as a married woman, that he is authorized now to come into court and claim to recover in this action. There was evidence in that case,—it is hardly necessary for me to discuss it, only it has been referred to before you by counsel to an extent which I think was scarcely warranted,—there was evidence in that case that is not in this case. Parties were sworn then that are not sworn now; and the reasons for the action of the court in that case, the reasons for these conclusions, are not matters for your consideration. The conclusion itself, namely, that Hexter failed to recover, is before you in evidence, and properly, as showing the right to institute this action." The court was right, we think, in excluding the testimony of the witnesses, in admitting the judgment, and also the testimony of Bast; but we think the offer of the pleadings, of the findings of fact and conclusions of law, were also admissible for the particular and special purpose stated.

We are of opinion, also, that it was proper to prove that there was a suit in equity between Hexter and Bast, although this does not appear to have been very important for the purpose of showing the matter out of which came the release, and to show the consideration upon which the transfer of the securities and the warranty were based.

We have not followed the assignments of error in their order, or discussed them singly; but disregarding and eliminating from the case all that is irrelevant to the issue in deceit, we

have indicated with as much clearness as we can the principles upon which we think the case should be retried.

The judgment is reversed, and a *venire facias de novo* awarded.

SALES—WARRANTY.—No particular words are necessary to constitute a warranty; it is sufficient if the words used were made and accepted as a warranty: *Beeman v. Buck*, 3 Vt. 53; 21 Am. Dec. 571; *Chapman v. Murch*, 19 Johns. 290; 10 Am. Dec. 227; note to *Setcas v. Woods*, 2 Am. Dec. 220; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; 34 Am. Dec. 108; *Van Buskirk v. Murchen*, 22 Ill. 446; 74 Am. Dec. 163; *Randall v. Thornton*, 43 Me. 226; 69 Am. Dec. 56; *Weimer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411. Representations by a vendor upon which he intends that the vendee shall rely, and upon which the vendee does actually rely, in making the purchase, amount to a warranty: *Drew v. Edmunds*, 60 Vt. 401; 6 Am. St. Rep. 122, and note; *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 382-386, note. But the mere expression of an opinion does not amount to a warranty: *Towell v. Gatewood*, 2 Scam. 22; 83 Am. Dec. 437; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; 34 Am. Dec. 108; *Osgood v. Lewis*, 2 Har. & G. 495; 18 Am. Dec. 317; *Sweet v. Colgate*, 20 Johns. 196; 11 Am. Dec. 266; *Erwin v. Maxwell*, 3 Murph. 241; 9 Am. Dec. 602.

SALES—WARRANTIES—RECENT CASES UPON THIS SUBJECT.—Ordinarily, an express warranty does not cover patent defects, but when there is difficulty in ascertaining the extent of a patent defect, the vendor may make himself liable under a general express warranty: *Thompson v. Harvey*, 86 Ala. 519. Where a contract for the sale and delivery of an article is in writing, the courts must look to the writing alone for the terms of the contract, in the absence of fraud: *Tisley v. Enterprise Stone Co.*, 127 Ill. 457. Where a vendor warrants a horse to be sound, in an action upon the warranty it is necessary, not only to show that the horse actually was not sound, but that defendant knew such fact: *Burnham v. Sherwood*, 56 Conn. 229. An express warranty may be waived on the part of the purchaser: *Woodbridge v. Royer*, 69 Md. 113. A representation as to the good health of an animal at the time of the sale does not constitute a warranty against future disease in such animal: *Bothwell v. Farwell*, 74 Iowa, 325. An implied warranty of title exists in the sale of a chattel: *Paulsen v. Hall*, 39 Kan. 365. Declarations of the vendor after a sale are not a warranty, and cannot be admitted as evidence against him: *Rogers v. Thurston*, 24 Neb. 326. Where an express warranty is alleged and proved, and there is no contention at the trial as to an implied warranty, an instruction as to the effect of an implied warranty is inapplicable to the issue, and calculated to mislead the jury: *Gibbs v. Wall*, 10 Col. 153. An honest expression of opinion, not purporting to be of the affirmant's knowledge, will be no ground for the rescission of a contract of sale: *Schramm v. Boston Sugar Refining Co.*, 146 Mass. 211; compare *May v. Hoover*, 112 Ind. 456; *Cooper v. Hall*, 22 Neb. 168; *Selberling v. Brauer*, 24 Id. 510.

HOLMES v. TALLADA.

[125 PENNSYLVANIA STATE, 128.]

PENSIONS. — **PENSIONER OF UNITED STATES MAY, UNDER UNITED STATES REVISED STATUTES, SECTION 4747,** Use the money received from his pension in any manner he may see proper, for his own benefit, and to secure the comfort of his family, free from the attacks of creditors.

PENSIONS. — **PENSIONER OF UNITED STATES, BY INDORSING AND GIVING TO HIS WIFE** a check received for accrued pension, and allowing her to draw the money and purchase land, taking the title in her own name, thereby puts the money beyond the reach of his creditors, and the land is not liable to seizure and sale for his debts.

EJECTMENT brought by John Holmes against Elizabeth Tallada and Jackson Tallada, her husband, to recover certain land. The latter, by leave of court, filed a disclaimer of title. The testimony at the trial showed that Jackson Tallada was indebted to the plaintiff, Holmes, evidenced by a judgment. A check was issued by a pension agent payable for accrued pension to Tallada as a soldier disabled in the service of the United States, and he indorsed the check, and gave it to his wife, who drew the money payable thereon, and therewith purchased the land in dispute, taking the title in her own name. Holmes afterward issued execution upon his judgment, and finding no personal property belonging to the defendant therein, caused a levy to be made upon the land in dispute then occupied by Tallada, his wife, and family, when Mrs. Tallada gave notice of her title. The land was sold under the writ, and was purchased by the plaintiff, who received the sheriff's deed therefor, and subsequently brought this suit. The court entered a judgment of compulsory nonsuit, and the plaintiff took this writ, assigning as error the order entering such judgment and the refusal of the plaintiff's motion to vacate it.

James Wood, for the plaintiff in error.

D. C. De Witt, for the defendant in error.

PAXSON, C. J. It is not disputed that the money with which the defendant, Elizabeth Tallada, purchased the real estate in controversy, was given to her by her husband, Jackson Tallada, and that at the time of such gift he was indebted to the plaintiff. Jackson Tallada received a check of \$1,642.60, for accrued pension, in April, 1885; he indorsed this check and gave it to his wife, who drew the money and applied it to the

purchase of the real estate in controversy, taking the title in her own name. The precise question raised by this record is, whether said real estate is liable to seizure for her husband's debt. In an ordinary case, such a gift by the husband to his wife would not be good as against existing creditors of the former. Section 4747 of the pension laws of the United States provides that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." This act not only protects the pension money from attachment while on its way to the pensioner, but it goes further, and declares that it "shall inure wholly to the benefit of such pensioner."

We need not discuss the question whether property purchased by a pensioner with the pension money, and held in his own name, would be liable to execution for his debts. No such question is before us. What we are called upon to decide is, whether it was a fraud upon creditors for Jackson Tallada to give this money to his wife for the purpose of purchasing a home for their joint benefit. In *Rozelle v. Rhodes*, 116 Pa. St. 129, 2 Am. St. Rep. 591, the pensioner had deposited the pension money with a bailee for safe-keeping, and it was held that it could be attached in the hands of the bailee. So here, if Jackson Tallada had deposited this money in his own name in bank, it might, under the authority cited, have been liable to attachment. But the words in the act of Congress, "shall inure to his own benefit," mean something. We think the rational interpretation of this language is, that the pensioner may use the money in any manner he may see proper, for his own benefit, and to secure the comfort of his family, free from attacks of creditors. The money cannot be attached in transit from the government to him, and when once in his own possession, I apprehend he could not be proceeded against under the act of 1842, for refusing to apply it to the payment of his debts. In his hands it was not liable to seizure, and the gift of it to his wife was not a fraud upon creditors. This privilege is a right which the government has given him in recognition of his services in its defense.

Judgment affirmed.

PENSIONS. — When money resulting from pensions becomes subject to garnishment: See extended note to *Roxelle v. Rhodes*, 2 Am. St. Rep. 596-598. Under the Colorado statute, pension money received from the United States government cannot be seized under execution, attachment, or be taken for any debt under judicial process: *Laws of 1887*, p. 352.

POWERS'S APPEAL.

[125 PENNSYLVANIA STATE, 175.]

EQUITY — LACHES. — COURTS OF EQUITY HAVE NOT ADOPTED the maxim of the common law, that wherever there is a right there is a remedy for its infraction. And if a party looks on and remains silent until large sums have been expended or important intervening interests have grown up, the fact that he might have successfully objected at the outset will not avail him.

EQUITY — INJUNCTION. — PARTY MUST NOT ONLY APPEAR IN COURT OF EQUITY WITH CLEAN HANDS, but he must come with reasonable promptness, in good faith, and with a just and equitable demand. And if an injunction is prayed for where, upon a consideration of the whole case, it ought not in good conscience to issue, a mere legal right in the plaintiff will not move the chancellor.

EQUITY — RIGHT LOST BY LACHES. — IT IS TOO LATE FOR PROPERTY OWNERS INJURED by the erection of an addition to a boom, in which, and in business enterprises depending upon it, thousands of dollars have been invested, to assert, after an acquiescence therein for fourteen years, that the boom company had no right, under its charter, to build the addition in the way it was built.

DEFINITIONS. — A BOOM IS AN INCLOSURE OR ARTIFICIAL HARBOR for logs and lumber, of which one side is furnished ordinarily by the natural bank of the stream, and the other is provided by the piers and the timbers or other obstruction to the passage of logs which connect them together.

STATUTES — CONSTRUCTION AS TO EXTENT OF AUTHORITY. — An act authorizing the construction of a boom on the south side of a stream is authority to use the shore on that side as part of the inclosure, and to erect, in connection therewith, the piers necessary to complete the inclosure on the other side.

BILL in equity to compel the defendant, the Bald Eagle Boom Company, to remove certain booms from the Bald Eagle Creek, to restrain forever the erection and maintenance of like illegal structures by the defendant, and to prevent the unobstructed flow of the waters of said creek in the ancient channel thereof. Other facts appear in the opinion. The bill was dismissed, and the plaintiffs assigned error.

Seymour D. Ball, for the appellants.

W. C. Kress and Charles Corss, for the appellee.

WILLIAMS, J. The maxim of the common law, that wherever there is a right there is a remedy for its infraction, has never been adopted by courts of equity. A party whose right is clear may sleep upon it until his demand becomes stale. He may look on while valuable structures are erected, when he might successfully object, and remain silent until large sums have been expended or important intervening interests have grown up. In such cases the fact that he might have objected at the outset will not avail him. A suitor must not only appear in a court of equity with clean hands, but he must come with reasonable promptness, in good faith, and with a just and equitable demand; otherwise, the conscience of the chancellor will not be moved. If an injunction is prayed for where, upon a consideration of the whole case, it ought not in good conscience to issue, a mere legal right in the plaintiff will not move the chancellor.

An application of these well-settled principles of equity jurisdiction to the plaintiffs' case is fatal to it. The Bald Eagle Boom Company was incorporated in 1859. Its boom was constructed soon after. In 1868 and 1869 the addition to the boom complained of by the plaintiffs was built, and a sheer-boom hung to turn the logs from the north shore of the stream into the main structure. The boom as extended has been in constant use since 1869. It is in an important sense a public improvement, in the maintenance and use of which the lumbermen and owners of timber-lands on the Bald Eagle Creek and its tributaries are interested. Thousands of dollars have been invested in it and in mills that are made accessible by it, and many millions of feet of timber are annually caught in it and rafted out to be manufactured at the mills in Lock Haven and other places down the stream. During all this time the plaintiffs have not been heard to object to the work of construction, but have applied for and secured an assessment of their damages on account thereof; and on one or more occasions since have recovered damages resulting from an overflow of their land when the boom was filled with logs.

The plaintiffs now assert that the boom company had no right to build the piers of the extension of the boom where they were built in 1869, and ask that the corporation be "restrained by injunction from continuing and maintaining their booms erected in said creek, and forever hereafter from the erection and maintenance of like illegal structures in the same."

This denial of the right of the boom company, coming after so many years of acquiescence, after the boom has become a necessity to the mills that have grown up in its neighborhood, and after the damages sustained by the plaintiffs in consequence of the construction of both the original boom and the enlargement in 1869 have been assessed at their instance, and paid by the boom company, comes too late to be conscionable. There is no equity in the plaintiffs' case, and the court below would have been fully justified in dismissing the bill for that reason. But if we turn now to the question of construction presented by the first and second assignments of error, the plaintiffs are equally without solid ground on which to stand.

The act of 1859 authorized the Bald Eagle Boom Company to "erect and maintain on the south side of Bald Eagle Creek such boom or booms with piers as may be necessary for the purpose of stopping and securing logs, masts, and spars or other lumber floating upon said creek, and such piers, side-branches, or shore-booms as may be necessary for that purpose," with a proviso that the boom should be so constructed as "not to impede the navigation of said creek or the branches thereof." The plaintiffs insist that the words "on the south side of Bald Eagle Creek" require the boom company to build on the south side of the middle line of the creek, or at most to include only the south half of the stream. But what is a boom? It is an inclosure or artificial harbor for logs and lumber, of which one side is furnished ordinarily by the natural bank of the stream, and the other is provided by the piers and the timbers or other obstruction to the passage of logs which connect them together. An act authorizing the construction of a boom on the south side of a stream is authority to use the shore on that side as part of the inclosure, and to erect, in connection therewith, the piers necessary to complete the inclosure on the other side.

Where these shall be located may be settled by the statute by words of direction, as "to be built along the middle of the stream," or "not to approach the opposite shore nearer than one hundred feet," or other expression indicating the purpose of the legislature to confine the exercise of the power granted to certain definite limits. In the act before us, the only limitation is found in the proviso which declares that the piers shall be so built as "not to interfere with the navigation of the said creek or its branches." The boom is to be so built that the south shore shall be occupied for that side of the inclosure.

The open channel for navigation is to be on the north side, and is to be sufficient for the purposes of navigation. Subject to the restriction in the proviso, the boom company may so locate their piers as to enable them to meet the purposes for which their incorporation was intended.

It follows from what has now been said that the ruling complained of in the third assignment was entirely proper, so far at least as this case is concerned.

The plaintiffs' remedy is not in equity, but at law. Whether that remedy is under the act of incorporation, or whether, upon the facts of this case, an action can be maintained, is not before us, and we are quite willing to wait until it is presented before expressing an opinion upon it.

The decree of the court below is affirmed, at the costs of the appellants.

In *Pennsylvania R. R. Co.'s Appeal*, 125 Pa. St. 189, one Mullin filed a bill in equity against said company, praying that the defendant might be enjoined from conveying the waters of a stream off a certain tract of land and from using the same excepting on and for the use of said tract, and for damages for the injury, etc. On an appeal from the decree of the court below awarding an injunction, it was held that as the plaintiff had stood by for seven years without taking any legal steps to prevent the defendant from diverting the water, and had allowed the defendant to expend large sums in that behalf, the plaintiff was guilty of undue laches, and had lost his right to an injunction, especially as his injury could be compensated in damages. In the opinion, Green, J., observes: "We think this was undue laches, and that it would be very oppressive to interfere by injunction at this late day, the more especially as the plaintiff's injury is entirely susceptible of compensation, and he has asked for that relief in his bill. It has been many times held that long delay, and sometimes a delay of even less than six years, will be regarded as laches sufficient to stay the intervention of equity"; citing *Ashbar's Appeal*, 60 Pa. St. 317; *Evans's Appeal*, 81 Id. 278; *Russell v. Baughman*, 94 Id. 400; *Todd's Appeal*, 24 Id. 429; *Neely's Appeal*, 85 Id. 387; *Rennyson v. Rozell*, 106 Id. 407.

BOOM COMPANIES ARE QUASI PUBLIC CORPORATIONS intended to supply facilities to the general public for driving logs: *West Branch Boom Co. v. Lumber and Lard Co.*, 121 Pa. St. 143; 6 Am. St. Rep. 766.

LACHES. — Equity may and often does refuse relief on account of the laches of complainant: *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and note 530, 531; *Irish v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638, and note 642; *Wright v. Fisher*, 65 Mich. 279; 8 Am. St. Rep. 886; *Bauman v. Kelley*, 38 Minn. 197; 8 Am. St. Rep. 661; *Bell v. Hudson*, 73 Cal. 285; 2 Am. St. Rep. 791, and extended note 795-808; note to *Burns v. Allen*, 2 Id. 860; *Walt v. Haskins*, 68 Tex. 418; 2 Am. St. Rep. 501, and note 505; note to *McCord v. Pike*, 2 Id. 104, 105; *Bangs v. Stephenson*, 63 Mich. 661; *Tevis v. Armstrong*, 71 Tex. 59, and cases therein cited and approved; *Land Co. v. Chisholm*, 71 Id. 523.

EVANS v. CLEARY.

(125 PENNSYLVANIA STATE, 204.)

MARRIED WOMEN — FOREIGN ATTACHMENT. — PENNSYLVANIA ACT OF 1848, SECURING TO MARRIED WOMEN the ownership and enjoyment of their separate property, but subjecting it to seizure for debts contracted by them for necessities after marriage, is comprehensive enough in its provisions to embrace legacies and distributive shares due to married women, and subject them to seizure by foreign attachment.

MARRIED WOMEN — CONFLICT OF LAWS. — WHERE JUDGMENT IS RECOVERED AGAINST MARRIED WOMAN IN ACTION ON CONTRACT made by her in a state under the laws of which a recovery may be had thereon against her alone, without her husband being joined, such judgment may be enforced in a proceeding against her in Pennsylvania, without joining the husband as a co-defendant, although at the time the proceeding was instituted such joinder was necessary under the laws of the latter state. In all matters relating to the remedy merely, the *lex fori* prevails, but the liability of a party to a contract depends on the *lex loci contractus*.

EVIDENCE. — WHERE PLAINTIFF'S CAUSE OF ACTION IS BASED UPON TRANSCRIPT OF RECORD OF JUDGMENT rendered by a justice of the peace in another state, duly certified as prescribed by the statute of the state where action is brought, such transcript is evidence *prima facie* of what appears upon its face, namely, that the defendant's liability upon a contract debt has been merged in a judgment.

STATUTE OF LIMITATIONS — CONFLICT OF LAWS. — In the absence of proof of a statute of a foreign state, putting a judgment obtained there before a justice of the peace upon the same footing with ordinary simple contract debts as to the statute of limitations, the law of such foreign state will be presumed to be the same as that of Pennsylvania, and an action in the latter state on the transcript of the judgment will not be barred at the end of six years from the entry of judgment.

WRIT of foreign attachment in debt, issued by P. Cleary against T. B. Evans and Mary A. Evans, his wife with whom he joined J. J. Pinkerton and others, executors of John Todd, deceased, to attach a legacy held by said executors for Mary A. Evans under the will of John Todd, her father. The cause of action was a transcript of the judgment of a justice of the peace of the state of Illinois. Other facts appear in the opinion. The verdict was for the plaintiff, and judgment being entered thereon, the defendant assigned error.

Abraham Wanger, for the plaintiff in error.

H. H. Gilkyson, for the defendant in error.

WILLIAMS, J. The claim of the plaintiff is for necessities furnished to Mary A. Evans, who was then and still is a married woman. She was domiciled in Chicago, in the state of Illinois, where she contracted for the goods with Cleary, a grocer of the same city. The statutes of Illinois provide that

a married woman may make contracts and incur liabilities in the same manner as if she was unmarried, and that such contracts and liabilities may be enforced against her separately, with the proviso that she may not enter into a partnership contract without his consent, unless he has deserted her, or become insane, or is confined in the penitentiary. Section 15 of chapter 68 of the statutes of Illinois also provides that "the expenses of the family and the education of the children shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors therefor; and in relation thereto they may be sued jointly or separately." Under the laws of the state in which the parties were domiciled, and the contract for necessities made, Mrs. Evans was competent to contract, and liable to be sued, in the same manner as if she had not been married. Cleary brought an action upon the contract of Mrs. Evans, against her alone, and recovered a judgment before a justice of the peace, in the city of Chicago, for the amount of the necessities furnished her. In 1885, this action was brought in the common pleas of Chester County by foreign attachment, and a legacy due Mrs. Evans was attached. It is now urged that the legacy was protected from attachment by the proviso in the foreign attachment law of 1842; that there can be no recovery against her without her husband is joined in the action and judgment; and that the statute of limitations is a defense to this action, as the action was not brought within six years after the rendition of the judgment in Chicago.

The act of 1848 restrained the marital rights of the husband, and relieved him from liability for debts contracted by his wife before marriage. It secured to her the ownership and enjoyment of her separate property; but it subjected it to seizure for her debts contracted before marriage, for necessities contracted for by her after marriage, and for her torts. For debts and demands belonging to the classes just enumerated, the act of 1848 declares that executions "may be levied upon and satisfied out of the separate property of the wife secured to her under the provisions of the first section of this act." This language is comprehensive enough to embrace legacies and distributive shares due to married women, and subject them to seizure for demands like that on which this attachment issued.

As to the non-joinder of the husband, it is only necessary to say that the contract which the plaintiff is seeking to enforce

was not made in this state, where prior to the act of 1887 such joinder was necessary, but in the state of Illinois, where Mrs. Evans lived, and where she was competent to contract and liable to be sued without regard to her husband. In all matters relating to the remedy merely, the *lex fori* prevails; but the liability of a party to a contract depends on the *lex loci contractus*: *Greenwood v. Curtis*, 6 Mass. 358; 4 Am. Dec. 145; *Swan v. Swan*, 21 Fed. Rep. 299; *Thompson v. Ketcham*, 8 Johns. 146; *Smith's and Wolf's Appeal*, 104 Pa. St. 381. This question was also considered in the recent case of *Spearman v. Ward*, 114 Id. 634, in which an effort was made to enforce the contract of a married woman made in Ohio. The action was against her, and it failed, not because the contract was not clearly proved, but because it did not appear that she was competent to make it, and liable upon it, by the laws of that state.

The remaining question is, whether the statute of limitations is a bar to this action. The plaintiff's right of action upon a transcript of a judgment rendered by a justice of the peace of another state is given by the act of 1845. In the fourth section it is provided that "the plaintiff, or the party in interest in such cases, shall, as evidence of his demand, produce on the trial a copy of the record or docket entry of the proceedings had before the justice who tried the original action, with his affidavit thereunto annexed, certifying the same to be a true and full copy of the record of the proceedings had before him, and that the judgment remains in force, and has not, to his knowledge, been vacated, annulled, or in any manner satisfied." This certificate is to be supplemented by one from the clerk of the court of common pleas of the county setting forth that the person before whom the proceedings purport to have been had was, at the time, an acting justice of the peace, duly commissioned and qualified. This "copy of the record or docket entry of the proceedings" is admitted under the authority of this statute as proof of the fact that the plaintiff has recovered a judgment against the defendant in the state from which it is brought, and upon it the plaintiff is entitled to recover a judgment here, unless the defendant can show some reason for refusing it. This copy of a justice's judgment does not have the conclusive effect given to the judgment of a court of record; but it is evidence *prima facie* of what appears upon its face, viz., that the liability of the defendant has been passed upon by a court competent to

do so, and a judgment rendered against him. It is not the note or account sued on in the state from which the transcript comes, but the judgment rendered upon it, that is the plaintiff's cause of action, and that is evidenced in the manner prescribed by the act of assembly. The note or account has been merged in the judgment rendered upon it by the foreign justice, and makes no part of the plaintiff's case. The statute cannot be interposed, therefore, unless applicable to the justice's judgment. No statute of Illinois has been brought to our attention which puts the judgment of a justice of the peace on the same footing with ordinary simple contract debts as to the statute of limitations, and in the absence of proof upon the subject, the law of Illinois will be presumed to be the same as our own. The statute of limitations does not take effect upon the judgment of a justice of the peace in Pennsylvania at the end of six years, and is not a defense in this case.

The judgment is therefore affirmed.

LEX FORI AND LEX LOCI CONTRACTUS: See *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690, and cases collected in note at page 698; note to *Arago v. Curriel*, 20 Am. Dec. 293, 294; note to *Decouche v. Savotier*, 8 Id. 490-492; note to *Satterthwaite v. Doughty*, 59 Id. 557-559.

APPEAL OF CORNWALL AND LEBANON RAILROAD COMPANY.

[125 PENNSYLVANIA STATE, 282.]

CONTRACTS — CONSTRUCTION OF — EQUITY JURISDICTION. — An agreement entered into between two railroad companies provided as follows: "In the use or working of the railroads of the parties hereto at or near the point of crossing, all trains, engines, or cars of the party of the second part shall come to a full stop at a distance of at least two hundred feet from the point of crossing, and shall not proceed until the proper signal shall have been given by the watchman in charge. All engines and trains of the party of the first part shall have priority of passage over the trains and engines of the party of the second part; but no unnecessary detention shall be caused to the trains of either of the parties hereto, nor shall said crossing be blocked by either of the said parties." In a suit in equity brought by the company of the first part against the other company to enforce the agreement, it was held that the language employed was unambiguous, and made no distinction of trains and engines into classes; that priority of passage was given to all engines and trains of the plaintiff over those of the defendant; that there was no warrant to go

outside of the agreement to ascertain by parol testimony the rules of priority of different classes of trains, and apply them to the agreement; and that jurisdiction in equity to enforce such agreements was undoubted.

BILL in equity filed by the Cornwall Railroad Company against the Cornwall and Lebanon Railroad Company, to enforce the terms of a written agreement executed by said companies, the material provision of which appears in the head-note and opinion. Other facts also appear in the opinion. The master recommended a decree in favor of the plaintiff, and the exceptions to his report were dismissed by the court below. The defendant assigned error.

John G. Johnson and Grant Weidman, for the appellant.

Howard C. Shirk and Wayne MacVeagh, for the appellee.

GREEN, J. The litigant parties to this contention undertook, wisely, to settle the terms upon which the crossing of their tracks should be conducted, by an agreement which seems to us to be extremely sensible, plain, and simple. The only controversy that has arisen is upon the practical meaning of the fourth clause of the contract. It is in these words: —

“4. In the use or working of the railroads of the parties hereto at or near the point of crossing, all trains, engines, or cars of the party of the second part shall come to a full stop at a distance of at least two hundred feet from the point of crossing, and shall not proceed until the proper signal shall have been given by the watchman in charge. All engines and trains of the party of the first part shall have priority of passage over the trains and engines of the party of the second part; but no unnecessary detention shall be caused to the trains of either of the parties hereto, nor shall said crossing be blocked by either of the said parties.”

The appellant contends that the agreement gave the right of way to the trains of the appellee over those of the appellant only when they were of the same class. After a most attentive consideration of the appellant's argument in support of this proposition, we find that we cannot read the agreement in that way. The words are: “All engines and trains of the party of the first part shall have priority of passage over the trains and engines of the party of the second part.” There is no ambiguity in this language. Priority of passage is given to all engines and trains of the first party over the trains and engines of the second party. The words are entirely generic, and make no distinction of trains and engines into classes. It

would be necessary to go outside of the agreement, and ascertain by parol testimony the fact that there are different classes of trains, such as passenger, freight, gravel, and construction or what other trains, and then to go still further and ascertain, also by parol, which of these were subject to the priority of any and which others, if the appellant's contention is sustained. But what warrant is there for this? The helping of ambiguity or the application of an uncertain description to a subject-matter are recognized occasions for such resort, but here there is neither.

The trains and engines of the first party are awarded priority, not because they are of a certain class, but because, and only because, they are the trains and engines of the first party; and the "trains and engines" of the second party are expressly subjected to this priority, without even a hint that there is to be any kind of classification of either. Of course, we can well understand that there might be very good reasons for limiting the exercise of the right to trains and engines of similar classes as against each other, but the difficulty is, the agreement not only does not say so, but it does not contain features which authorize the courts to give it such interpretation. If the parties had so intended, it would have been very easy indeed for them to say so. The fact that they have not done this is satisfactory evidence that they did not so intend.

The appellant further argues that a full stop at any point more than two hundred feet from the crossing was sufficient, provided it was made at one sufficiently near the crossing to permit the watchman to give the proper signals. As an abstract proposition, this is doubtless true, but its purpose is to defeat the ruling of the master and court below, which directed that full stops be made by all approaching trains between two hundred and three hundred feet both north and south of the crossing. There is, of course, no legal necessity, from the mere language of the agreement, requiring the farthest limit to be fixed at three hundred feet from the crossing. The master so fixed it, partly because the appellant had, from May 7 to May 13, 1887, stopped all its trains at a distance of about three hundred feet from the crossing on both the north and south sides, and partly because his interpretation of the agreement was, that it meant that the stops should be at least two hundred feet from the crossing, and not far away from that as the outside limit. He found as a fact that the appellant stopped

their south-bound trains at a distance of eight hundred to nine hundred feet on the north side of the crossing, and he held that this was too far off, and was not in accordance with either the letter or spirit of the agreement. He found that the crossing was a dangerous one on account of the manner in which the appellant's track crossed the appellee's track, and the conformation of the ground, being a high bluff, east or northeast of the crossing, which obstructed the view of engineers coming from the south from trains and engines coming from the north, until the trains and engines are very near the crossing. He also found that the railroads of both parties approach the crossing from the south on heavy grades, and the Cornwall road approaches the crossing from the south and north in a curve above the average curvature as generally found in railroads. He also finds that the safety of the operation of the crossing depends almost entirely upon the reliability and cautiousness of the watchman placed there to protect and guard approaching trains and engines. Influenced by these considerations, and by the further thought that a far-off stoppage would be less conducive to safety than one nearer by, he fixed the place of stoppage at any point between two hundred and three hundred feet distant from the crossing on both sides. If there were anything arbitrary and unreasonable in thus fixing the maximum distance at three hundred feet, or if it were made clear to us that such a maximum works oppressively upon the appellant, and that a moderate enlargement of the distance, say to four hundred feet, would relieve the appellant from the hardships, and would not increase the danger to the public, we would cheerfully direct such increase in the maximum distance. But the case of the appellant, as we understand it, is presented to us on the proposition that their trains on the north regularly stop at a station which is some eight hundred or nine hundred feet distant, and the appellant considers that distance sufficiently near to avoid the necessity of another stoppage. The master, however, has found differently on this subject, and we are not convinced that he is in error in that regard. On the contrary, his reasons for fixing a nearer point as the maximum distance seem to us quite convincing in favor of his conclusion. He had far better opportunities for determining this than are possible to us, and we do not feel justified in changing the distance as fixed by him. There is no question of law involved in this matter. It is only a question of a sound discretion, regard

being had to the public safety on the one hand, and the convenience of the crossing road on the other.

Counsel have not discussed this case on its facts, and we would therefore be justified in holding that the conclusions of fact reported by the master have not been impeached, and must for that reason be sustained, especially as they have been affirmed by the court. But the writer has looked into the testimony for his own satisfaction, and finds that the master's conclusions of fact are sustained by abundant testimony. Witnesses were examined who testified to a number of occasions when disastrous collisions at the crossing were narrowly escaped. Full explanations were given by intelligent witnesses of their reasons for pronouncing the crossing a dangerous one, and describing the precautions that ought to be taken to make it reasonably safe.

As to the jurisdiction of equity in cases like this, it cannot be doubted. It has been conferred by statute, and most fully recognized and affirmed by the decisions of this court: *Northern Cent. R'y Co.'s Appeal*, 103 Pa. St. 621; *Pittsburg etc. R. R. Co. v. Railway Co.*, 77 Id. 173. Upon the facts found by the master and affirmed by the court, a sufficient case was made out for equitable intervention. The enforcement of such a contract as the one made between these parties can only be secured by means of a decree in equity. An action at law for breach of its terms would be of no avail. It would not be possible to represent the consequences of a breach by money damages, and a literal performance of its stipulations is essential, not only in the interests of the contracting parties, but also in the interests of the traveling public.

We know of no reason for interfering with the disposition of the costs as made by the court below.

Decree affirmed, and appeal dismissed, at the cost of the appellant.

PAROL TESTIMONY IN REFERENCE TO WRITTEN CONTRACTS. — In addition to the recent cases upon this subject to be found collected in a note to *Sullivan v. Lear*, ante, pp. 393, 394, are the following cases: —

Contemporaneous Agreements. — Parol testimony of a contemporaneous verbal agreement as to the particular manner of testing machinery is not admissible, where a suit is brought upon a written contract for the sale thereof upon approval: *Exhaust Ventilator Co. v. Chicago etc. R'y Co.*, 69 Wis. 454. But parties may enter into an oral agreement contemporaneously with a written contract, provided such oral agreement is separate and independent in its terms, and in no particular varies or contradicts the written agreement: *Schoen v. Sunderland*, 39 Kan. 758. Yet it has been held that where defend-

ant made a written contract to pay money upon a single condition, as set forth plainly in the written instrument, he could not plead, by way of defense, that the conditions of a contemporaneous oral agreement were violated and broken: *Blair v. Buttolph*, 72 Iowa, 31. So a contemporaneous parol agreement to extend the time of payment cannot change the terms plainly set out in the written contract of the loan: *Booth v. Hoskins*, 75 Cal. 271. And when a written contract is full, complete, and perfect on its face, in the absence of fraud or mistake, it cannot be shown that there was an additional contemporaneous agreement, a part of which agreement was, that the whole contract was not to be reduced to writing: *Warbasse v. Card*, 74 Iowa, 306; for where there is no ambiguity in the terms and conditions of a contract in writing, the writing must be regarded as expressing and being the entire contract really agreed on by and between the parties thereto: *Lynch v. Ortlieb*, 70 Tex. 727; *Blake etc. Co. v. Home Ins. Co.*, 73 Wis. 667; and in the absence of fraud or mistake, where a contract in writing contains all the essential elements of a valid contract, and its terms are sufficiently comprehensive to embrace the whole subject-matter of the contract, no oral evidence can be introduced to vary, extend, or contradict it: *Parter v. Merrill*, 98 N. C. 232, and cases therein cited with approval.

Contemporaneous Circumstances, and Conduct of the Parties. — Evidence of the surrounding circumstances under which a contract was executed is inadmissible to show the unexpressed intention of the parties, or their prior verbal negotiations; for such circumstances are never admissible except by way of clearing away any ambiguities patent upon the face of the written contract: *King v. Miriman*, 38 Minn. 47. Where a plaintiff has offered oral evidence as to the conduct of the contracting parties to a written contract, in order to show the interpretation put upon such contract by the parties themselves, he cannot complain because defendant shows the conduct of parties more fully: *South St. Louis R'y Co. v. Plate*, 92 Mo. 614.

Contemporaneous Written Agreement. — Two written instruments entered into by and between the same parties at the same time in reference to the same subject-matter, and having the same common purpose in view, are construed together as constituting but one and the same entire contract: *Hagerty v. White*, 69 Wis. 317.

Antecedent Parol Agreements. — As a general rule, antecedent parol agreements are merged in and extinguished by a subsequent written agreement: *Stuebben v. Granger*, 63 Mich. 306; *Stoddard v. Nelson*, 17 Or. 417.

Subsequent Parol Agreements. — A parol agreement subsequent to the completion of a written contract in reference to the same subject-matter is never binding unless supported by a new consideration: *Curuthers v. McMurray*, 75 Iowa, 173. A subsequent parol agreement cannot create a new and continuing contract, so as to take an original, antecedent, written agreement out of the operation of the statute of limitations: *Booth v. Hoskins*, 75 Cal. 271.

Circumstances under Which Parol Testimony is Admissible. — Parol testimony, to explain the subject-matter of a contract in writing, is ordinarily admissible, when necessary for its interpretation, and not inconsistent with its terms: *Centenary M. E. Church v. Clime*, 116 Pa. St. 146; *Stout v. Weaver*, 72 Wis. 148. Compare *Blake etc. Co. v. Home Ins. Co.*, 73 Id. 667; *Comery v. Howard*, 81 Me. 421; *Williams v. Flood*, 63 Mich. 487; *Grange Warehouse Ass'n v. Owen*, 86 Tenn. 355.

ERIE AND WYOMING VALLEY R. R. Co. v. SMITH.

[125 PENNSYLVANIA STATE, 259.]

EVIDENCE — RES GESTÆ. — Declarations as to defect in engine, made by officers of a railroad company, after an accident, resulting in the death of one of the company's employees, constitute no part of the *res gestæ*, and are not admissible as evidence on the part of the plaintiff in an action against the company for negligently causing such death, when not offered in contradiction of prior testimony of such officers.

EVIDENCE. — ERROR IN ADMITTING EVIDENCE WHICH TENDS TO PREJUDICE the minds of the jurors is not cured by a direction in the charge of the court to the jury to disregard the evidence, and by a withdrawal of it from their consideration. The instruction comes too late to cure the mistake.

EVIDENCE — BURDEN OF PROOF IN ACTION FOR NEGLIGENCE. — When a railway passenger is injured or killed by an accident due to the alleged negligence of the railroad company, the burden of proof rests upon the company, in an action against it for damages, to rebut the presumption of negligence arising from even slight evidence of the defective construction of its track; but in the case of an employee of the company so injured or killed, there is no such presumption to be overcome, and the plaintiff must affirmatively prove the fact of negligence, and that it is such a kind of negligence as violates the special and limited duty of an employer to an employee.

ACTION in case brought by Amelia L. Smith against the Erie and Wyoming Valley Railroad Company to recover damages for the death of F. M. Smith, her husband, resulting from an accident due to the alleged negligence of the defendant. Smith was a fireman on one of the defendant's locomotives, and while rounding a certain curve in the defendant's track, the locomotive suddenly mounted the outer rail, and after running some distance on the ties, upset outside the track, throwing Smith under a truck, whereby he received injuries from which he died soon afterward. The plaintiff called two civil engineers, Stevenson and Rodman, who were permitted to testify, against the defendant's objections, as to the condition of the road-bed and curve, set out at length in the opinion. Two locomotive-engineers, Caskey and Hayes, were called by the plaintiff, and were permitted to testify, against the defendant's objections, as to their judgment with regard to the safety of Wootten engines, similar to the one with which the accident happened. The plaintiff also called three witnesses, Biesecker, Vaughan, and Allen, to prove declarations made by Warg, superintendent of motive power, and by Hopkins and Smith, engineers of defendant's road, as to alleged defects in the engine, which declarations were made after the

date of the accident, and the testimony was admitted against the defendant's objections. Other facts appear in the opinion. The verdict was for the plaintiff, and judgment was entered thereon. The defendant assigned error.

H. Wilson, J. A. Buchanan, and W. H. Dimmick, for the plaintiff in error.

John Houston Merrill, A. T. Searle, and M. M. Treadwell, for the defendant in error.

GREEN, J. In no possible point of view were the declarations which were admitted in evidence under the thirteenth, fourteenth, and fifteenth assignments of error competent. The testimony of Vaughan as to what Hopkins had told him was not admissible as a contradiction of anything as to which Hopkins had been asked; and as declarations by agents while in the course of their duty, all the declarations of the three persons, Warg, Hopkins, and Smith, were incompetent, because they were not part of the *res gestæ*. The rule of law upon this subject is so perfectly familiar that it is not necessary to refer to the authorities. These three assignments are therefore sustained.

The assignments from number 11 to 15, both inclusive, relate to the admissibility of evidence in regard to the condition of the locomotive. It was all received on the trial, but in the charge the learned court below withdrew it all from the consideration of the jury as being entirely insufficient to convict the defendant of any negligence in relation to the engine. After the testimony was closed, and before counsel addressed the jury, a motion was made to strike out this testimony, but was refused by the court, under exception.

It has long been held, and in many cases, that where evidence has been improperly received which tends to prejudice the minds of the jurors, and the court in the charge directs the jury to disregard the evidence, and withdraws it from their consideration, this instruction comes too late, and does not cure the error of admitting it: *Delaware etc. Canal Co. v. Barnes*, 31 Pa. St. 193; *Pennsylvania R. R. Co. v. Butler*, 57 Id. 335; *Huntingdon etc. R. R. Co. v. Decker*, 82 Id. 119. In the last case, Mercur, J., said, referring to *Delaware etc. Canal Co. v. Barnes*, *supra*: "The manifest reasoning of the court was to hold that whenever the testimony received was of such a character as to inevitably tend to prejudice the minds of the jurors, the error was not cured by the court telling them, after the argu-

ment had closed, not to consider the testimony." And in *Pennsylvania R. R. Co. v. Butler*, *supra*, Sharswood, J., said: "It is in entire accordance with the opinion in that case to hold, as we do here, that if improper evidence is given tending to inflame the damages, and it is not struck out at or before the close of the testimony, so that counsel shall not be allowed to refer to or dwell upon it in their address to the jury, it is altogether too late to cure the mistake by directing the jury to disregard it in the charge."

These several assignments are therefore sustained, and also that part of the sixteenth assignment which relates to the testimony of Caskey and Hayes.

The remaining portion of the sixteenth assignment relates to the refusal of the court below to strike out the testimony of the plaintiff's witnesses Stevenson and Rodman, who gave evidence in regard to the curve in the track and the condition of the road-bed. The court was of opinion that this portion of the testimony might be considered by the jury. In an exceedingly fair and clear manner the judge explained to the jury just how far they might consider the testimony on this subject, and in what event they might find for the plaintiff. He said the railroad company is not responsible to its employees for the manner in which the engineer lays out the curves upon the road; the jury could not be permitted to review the skill and judgment of the engineer in such a matter, but he said they might review the manner in which the rails were laid. After much careful reference to the testimony of the two witnesses, and they were all who testified on this subject, in regard to an alleged irregularity in the line of the curve as the rails were laid, he said: "If you find that the irregularity existed, and that it existed prior to this accident, then the question is, whether such an irregularity was the occasion of danger such as to make this company guilty of negligence." The evidence in question was limited to that of these two witnesses. The substance of their testimony was, that on the 22d of April, which was thirty-three days after the accident, they went to the place of the accident, and examined the track, and took various measurements to show the degree of the curve and any variations from uniformity or regularity that might exist. They said they found it to be a nine-degree curve, which varied to as low as seven degrees twenty minutes in one place, to ten degrees twenty minutes at the place of the accident; that this variation would make a slight difference

in the line of the curve which would not be sufficient, however, to be visible to the naked eye, and that it would require a variation of three or four degrees to make it visible.

The witness Stevenson said that there was more or less variation in the curves on all railroads, but that there was more in this instance than he had seen on other roads. The witness Rodman gave no measurements, and in fact said nothing about any variations. He was examined as to other matters. There was no other testimony for the plaintiff in regard to this matter. These witnesses were not on the track on the day of the accident, nor until the time of their measurements, on April 22d. Of course the testimony would have but little value as to the condition of the road on the 19th of March. They went back in October, 1887, and said they then found the road in good condition, the curves more regular and with little variation. The defendant's road-master testified that nothing had been done to the track from the time of the accident to the time of the trial, and no witness testified to having done any work on the rails or seen any done in that time. The learned court submitted the evidence as to the variations in the curve to the jury, with instructions that they might find negligence on the part of the defendant sufficient to enable the plaintiff to recover.

If any testimony had been given to the effect that the condition of the rails as described by Stevenson and Rodman was the cause, or might be the cause, of the engine mounting on the rail, or if they had described how such a result might, or could, or probably would, have resulted from such a condition of the rails, there would be something from which a jury might be able to draw an inference of negligence in that respect, but there is not a particle of such evidence in the case. Neither of these witnesses, nor any other, testified that the slight variation from a regular curve in the line, so slight that it could not be seen, as described by Stevenson and Rodman, could or probably would cause the wheels of the engine to mount the rail. On the contrary, the evidence was positive, not at all contradicted, that this was the only instance in which such an accident had happened; that this same engine and other engines were constantly running over this curve for many months before and after and on the day of the accident, and not one ever mounted the rail. Hence it was only possible to conjecture that the mounting of the rail might have been caused by the variation from the line of a regular curve

in the rails, but it would be at best but a conjecture, without any evidence to sustain it, and opposed to all the probabilities of the case as illustrated by the whole experience of the road. Had the fireman been a passenger, he would have had the benefit of a presumption of negligence which it would have been the duty of the company to rebut. But with an employee there is no such presumption, and he must prove affirmatively the fact of negligence, and that it is such a kind of negligence as violates the special and limited duty of an employer to an employee. The case is simply and utterly destitute of that kind of evidence, and we cannot sanction the result that was reached without a palpable disregard of all the well-considered decisions of our own and other courts which so carefully prescribe the conditions of liability of an employer to an employee on the ground of negligence.

There was some little testimony in regard to the ballasting of the track, but it proved nothing whatever as to the cause of the accident. It did not show that there was or could be from that source any depression of the track at the place of the accident. The engineer, O'Hara, who was running the engine at the time, said that after they had gone about a hundred or a hundred and fifty feet on the curve, the engine "seemed to sag over just as though she struck a soft spot in the track"; that "she came back again, that is, she recovered from the sag, and it did not seem to be over the length of a rail before she struck another such place, and she never recovered entirely from that. She seemed to go over and come part way back, and then tipped right over." He adds: "I don't know what caused her to roll in that way,—whether it was a soft spot in the track, or whether she left the track. . . . Whether she was on the track or off from the track, I could n't tell." This is a description of the fact of the accident and the manner of its occurrence, but it altogether fails to show the cause of it. As a matter of fact, the ground was frozen, and no soft spot was discovered, but even if there had been, there could have been no recovery on that ground by an employee without much further testimony. The cause of this accident was entirely unexplained, and it therefore can only be regarded, in an action by an employee, as one of the ordinary risks of the business for which there is no liability. The defendant's third, eighth, and ninth points should have been affirmed, and the case withdrawn from the jury. These views sustain the fourth, fifth, sixth, and ninth assignments, and also that part

of the sixteenth which relates to the testimony of Stevenson and Rodman. It is not necessary to consider the remaining assignments.

Judgment reversed.

NEGLIGENCE—BURDEN OF PROOF.—Ordinarily the burden of proving negligence is upon him who alleges it: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416, 9 Am. Dec. 630, and note 637; compare note to *Smith v. St. Paul City R'y Co.*, 50 Am. Rep. 553-560; note to *Farish v. Reigle*, 62 Am. Dec. 679-689; note to *State v. Maine Central R. R. Co.*, 49 Am. Rep. 628, 629, as to the law in reference to burden of proof in negligence cases; *Pennsylvania R. R. Co. v. MacKinney*, 124 Pa. St. 462; 10 Am. St. Rep. 601, and note 607, 608. When one suffers injury in a railway accident there is a *prima facie* presumption of negligence on the part of the railway company; and the burden of proof is upon the company to prove that negligence did not exist on its part: *Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533; *Sullivan v. Philadelphia etc. R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 698, and note 702; *Breen v. New York C. etc. R. R. Co.*, 109 N. Y. 297; 4 Am. St. Rep. 450, and note 452; *City and Suburban R'y Co. v. Findley*, 76 Ga. 311.

RES GESTÆ—DECLARATIONS.—As to what declarations do and what do not constitute *res gestæ*, see *Leahey v. Cass Avenue R'y Co.*, 97 Mo. 165; 10 Am. St. Rep. 300, and cases collected in note 306; *Missouri Pac. R'y Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758; note to *People v. Vernon*, 95 Am. Dec. 52-71.

BROWN'S APPEAL.

[125 PENNSYLVANIA STATE, 303.]

INSURANCE—RIGHT TO FUND AFTER ASSIGNMENT OF LIFE POLICY.—A

New York insurance company issued a policy upon the life of a citizen of Pennsylvania, payable to the wife of the insured, for her sole use, but providing that in case of her death before the decease of the insured, the amount of the insurance should be payable to her children. Both the insured and his wife joined in an assignment of the policy, and afterward the wife died, leaving the insured and seven children to survive her. After the death of the insured, the assignee of the policy, and the children of the deceased wife of the insured, made claim to the amount of the policy, and an interpleader was instituted by the company to determine the right to the fund. In such case, the contest being over a fund paid by the foreign corporation into the court of the common domicile of the claimants, its adjudication would depend upon the construction of the policy itself under which the parties claimed, and not upon the question whether the *lex fori* or the *lex loci* ought to prevail; and the wife's interest in the policy having been extinguished by her death in the lifetime of her husband, and her assignee being in no better position than she herself occupied at the time of the assignment, the amount of the insurance was payable to her children.

BILL of interpleader. The material facts appear in the opinion.

Edward J. Fox, Elisha Allis, and Edward J. Fox, Jr., for the appellant.

F. Green, for the appellees.

WILLIAMS, J. This case presents but a single question. In 1865 the Germania Life Insurance Company, a New York corporation, issued a policy of insurance upon the life of Daniel P. Sandt, a citizen of Pennsylvania, for two thousand dollars. It was made payable to Diana Sandt, the wife of the insured, for her sole use, with a provision that "in case of the death of the said Diana Sandt before the decease of the said Daniel P. Sandt, the amount of the said insurance shall be payable after her death to her children for their use, or to their guardian if under age." In 1875 both husband and wife joined in an assignment of the policy to A. J. Brown, the appellant. In 1884 Diana Sandt died, leaving her husband and seven children to survive her. In 1888 Daniel P. Sandt, the insured, died. The assignee of the policy and the children of Mrs. Sandt made claim to the amount of the policy, and the company properly asked the court of common pleas of Northampton County, where all the claimants lived, for leave to pay the money into court, and that the claimants interplead with each other. If the assignment of Mrs. Sandt was effectual to vest in her assignee a good title to the policy, then he was entitled to the fund.

The assignment is formal, and her husband joined her in its execution. Whatever title she had, therefore, passed to her assignee. The extent and character of her title appeared plainly on the face of the policy. She was the payee named in the first instance, but the promise to her was not an absolute and unconditional promise to pay to her, or to her administrators, executors, or assigns; but a promise to pay her upon condition that she was living when the policy should fall due.

If she survived her husband, the insurance money was payable to her, but if she did not, it was payable to her children then living. Their right to the money depended upon the terms of the contract, which was payable to them if she was not living at the death of the insured. They were parties to the contract as truly as she was, and with as clear a right to sue upon it, upon the happening of the contingency that made them the payees, as she could have had if living. Her assignment put her assignee in no better position than she occupied, and conferred upon him no greater interest in the policy. Her

death in the lifetime of her husband extinguished her interest in the policy, and it can no more survive in the hands of her assignee than in her administrator. The condition on which her right to recover was to end, and that of her children was to arise, has happened, and the contract of the insurance company is now with the children, and must be enforced by them for their benefit.

It seems to have been thought that an important question about whether the *lex fori* or the *lex loci* ought to prevail, was involved in this case, but that is a mistake. The insurance company came into this state, and paid the money into court for the benefit of the party entitled to it. The present contest is between residents of this commonwealth, over a fund in the possession of the court of the common domicile, and depends upon the construction of the contract under which both parties claim.

The judgment is affirmed.

LIFE INSURANCE. — WHO HAS A RIGHT TO THE FUND AFTER ASSIGNMENT OF THE POLICY: See *Martin v. Stubbings*, 128 Ill. 387; 9 Am. St. Rep. 620, and note 630; note to *New York Life Ins. Co. v. Flack*, 56 Am. Dec. 747-755.

FOWLER'S APPEAL.

[126 PENNSYLVANIA STATE, 388.]

TRUSTS AND TRUSTEES — VALIDITY OF TRUST UNDER STATUTE RELATING TO ACCUMULATIONS. — By the terms of a deed of trust, the trustee was required to pay over the income and dividends of the trust estate to M., "and should the said M. die, the said trust herein declared shall inure to the benefit of her heirs; but if she have no children, the same shall revert to my estate"; and there was a further direction to add fifty dollars per year out of the income to the principal. The deed was executed in Illinois, the beneficiary was a citizen of Colorado, and the trustee was a Pennsylvania corporation. After the execution of the deed, M. gave birth to a child, and the grantor subsequently died without having in any manner exercised the power of revocation reserved in the deed. In such case the estate of M. was merely an equitable estate for life, which did not become absolute by the birth of issue, and was not enlarged by the remainder to her heirs; and the mere fact that the trustee was a Pennsylvania corporation did not invalidate the trust, under the act of 1863, section 9, concerning accumulations, since the trust was valid by the law of the state where made and of the state where it was to be enjoyed.

BILL in equity filed by A. H. Fowler and Marie W. Fowler, his wife, in right of the latter, against the Fidelity Insurance,

Trust, and Safe Deposit Company. Elihu B. Washburne of the state of Illinois executed a declaration of trust, the terms of which, together with other facts so far as material to the case, appear in the head-note and opinion. The bill, after reciting the said deed of trust and the facts referred to, thus continued: "3. That, by the terms of the said writing, the said Marie Washburne Fowler was and is invested with the full and absolute equitable interest both in the principal and income of the said bonds or certificates of indebtedness to the said defendant; and that the said Elihu B. Washburne failed to declare in said writing any reason for the maintenance of the trust which is recognized by the laws of this commonwealth (Pennsylvania); 4. That direction to the said trustee in said writing contained, requiring him to deduct from the income and dividends to be received the sum of fifty dollars annually, and to add the same to the principal, is in violation of the statutes of the commonwealth of Pennsylvania in such case made and provided." The prayers were, that the defendant give, transfer, and deliver to the said Marie Washburne Fowler the said bonds or certificates of indebtedness hereinbefore mentioned, to be held by her in her own right, free from all trusts whatsoever; or if such relief may not be granted, 2. That the defendant be required to pay her all money "retained by the said defendant out of income retained by it under the direction for accumulation in said writing contained, as well as the full net income and dividends upon the said securities as they may hereafter accrue; 3. General relief." The answer did not deny any of the material facts averred in the bill, which was dismissed by the court below, and the plaintiffs assigned error.

Richard C. Dale and Samuel Dickson, for the appellants.

J. M. Gest and W. P. Gest, for the appellees.

PAXSON, C. J. By the terms of this deed of trust the trustee is required to "pay over the income and dividends on said bonds to Marie Washburne Fowler (appellant). . . . And should the said Marie Washburne Fowler die, the said trust herein declared shall inure to the benefit of her heirs; but if she have no children, the same shall revert to my estate." There was a further direction to add fifty dollars per year out of the income to the principal. It also appeared that since the execution of this paper the said Marie has given birth to

a child, who is now living, and that the settler or donor, Elihu B. Washburne, died without having in any manner exercised the power of revocation reserved in the deed of trust. The question is, whether the said Marie W. Fowler is entitled to the *corpus* of the trust estate, consisting only of corporation bonds, freed and discharged from the trust. The court below decided that she was not, and in this we see no error.

The estate of Mrs. Fowler is merely an equitable estate for life, which did not become absolute by the birth of issue, and which is not enlarged by the remainder to her heirs. It is true the income is not expressly given to her for life, that is, the words "for life" are not used in the deed of trust, but such is the necessary implication from the language employed. The meaning of the word "heirs" is qualified by the use of the word "children," which immediately follows. We have, then, a gift to Marie Washburne Fowler of the income for life, with remainder to her children, if any, and in default of children, the gift is to revert to the estate of the grantor. We do not think there is any analogy between Mrs. Fowler's estate and an estate upon condition at common law before the statute *de donis*, whereby the birth of issue fulfills the condition and renders the estate indefeasible. The words "should Marie die" evidently means "when Marie dies," as her death was a certain event; and the words "if she have no children" evidently refer to children at the time of her death: *Cote v. Von Bonnhorst*, 41 Pa. St. 243.

Nor do we think the direction to accumulate is invalid under the act of 1853. The act does not apply. The settler was a citizen of Illinois and died there; the deed of trust was made there; the securities are those of foreign corporations, and Mrs. Fowler is a citizen of Colorado. I do not understand it to be denied that the trust is valid by the law of the state where it was made and of the state where it is enjoyed; and the mere fact that the trustee happens to be a Pennsylvania corporation cannot invalidate the trust. The act of 1853 was only intended to apply to our own citizens, and a trust intended to take effect beyond our own territory cannot be affected by it. Authorities upon this point are not abundant; at least they have been sparingly cited. We may refer, however, to *Attorney-General v. Stewart*, 2 Mer. 161; *Curtis v. Hutton*, 14 Ves. 537; *Hill on Trustees*, 457; *Draper v. College*, 57 How. Pr. 289; *Chamberlain v. Chamberlain*, 43 N. Y. 438; *Crum v. Bliss*, 47 Conn. 592. The case is clear upon principle.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

LIFE ESTATE. — Where a testator devised to his daughter certain property "to have and hold during her natural life," then to go to her children in fee, but if she should die without children, to go to her brothers, etc., and she had no children at the time of the making of the will, but subsequently, after the death of the testator, she had children, she took only a life estate under the will: *Cole v. Von Bonnhorst*, 41 Pa. St. 243; note to *Carpenter v. Von Olander*, ante, p. 99-107.

SEITHER v. PHILADELPHIA TRACTION COMPANY.

[125 PENNSYLVANIA STATE, 397.]

TRESPASS. — SEPARATE SUITS MAY BE BROUGHT AGAINST SEVERAL DEFENDANTS for joint trespass; but whenever the plaintiff has actually received satisfaction from one of them for the injury he has sustained, the cause of action is discharged as to all.

TRESPASS — EFFECT OF RELEASE OF JOINT TRESPASSER. — When a passenger injured by a collision of street-railway cars brings suit against both companies, a release of the carrying company from all liability for the injury, in consideration of a sum of money paid to the plaintiff, operates as a discharge of the other company from liability also; and this rule applies, although evidence is offered that the collision was due entirely to the negligence of the latter company, and the right of action against it was expressly reserved.

TRESPASS brought by F. W. Seither against the Philadelphia Traction Company, declaring for personal injuries received through the alleged negligence of the defendant company. The material facts appear in the opinion.

P. F. Roethermel, Jr., for the plaintiff in error.

David W. Sellers, for the defendant in error.

By COURT. The rule is well settled that while separate suits may be brought against several defendants for a joint trespass, and there may be a recovery against each, yet the plaintiff can have but one satisfaction: *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330. And whenever the plaintiff has actually received satisfaction for the injury he has sustained, the cause of action is discharged: *Fox v. The Northern Liberties*, 8 Watts & S. 103; Addison on Torts, sec. 1353.

The plaintiff, while riding as a passenger in a car of the Peoples Passenger Railway Company, was injured by a collision of said car with a car of the Philadelphia Traction Company, defendant. He brought suit against both companies,

and recovered a verdict of fourteen thousand dollars against the company first named. This verdict was set aside by the court, probably because of its excessive amount, and a new trial granted. The plaintiff then settled with the said company (the Peoples), was paid six thousand dollars in full of all claim against it, and executed a release in its favor. He also by said paper agreed to prosecute his claim against the Traction company, and in case he should recover against it, he was to reimburse the Peoples company for the wrong he received from it; the balance, if any, over the six thousand dollars he was to retain for his own use. The court below held very properly that this agreement and release was a bar to a recovery in this action.

The plaintiff had received one satisfaction; he was not entitled to a second. In his suit against the carrying company, the plaintiff could only have recovered a verdict by showing that the collision was caused by its negligence; in other words, that the Peoples company, and not the Traction company, was in fault. In the opening sentence of the printed argument in this case, we find the following: "The evidence offered by the plaintiff proves that while riding in a car of the Peoples company he was injured by a collision due entirely to the negligence of the Traction company, the carrying company and its agents being absolutely without fault." At the time this paragraph was written the plaintiff had in his pocket the sum of six thousand dollars, which he had received from the company which he now says was "absolutely without fault." A case so unique as this might be supposed to stand alone in the books: *Tompkins v. Railroad Co.*, 66 Cal. 165, is, however, its exact counterpart. There a woman was injured by a collision of street-railway cars. She received compensation from the carrying company, and executed a release. She then sued the other railway company, contending that her release was not intended as a satisfaction, but because the carrier was without fault, and the existing defendant was the real wrong-doer. The court held, in a vigorous opinion, that she could not recover. So we say here. The plaintiff was not entitled to recover, and the learned court below was entirely right in directing a verdict for the defendant.

Judgment affirmed.

EFFECT OF A RELEASE TO OR SATISFACTION ACCEPTED FROM ONE OF SEVERAL WRONG-DOERS. — Where a person is injured by the wrongful act of several joint wrong-doers, the law permits him to proceed against them either

jointly or severally. As the cause of action is against them all, the plaintiff may sue all or either of them at his election: *Bloss v. Phymale*, 3 W. Va. 393; 100 Am. Dec. 752; *Werner v. Edmiston*, 24 Kan. 153; *Jack v. Hudnall*, 25 Ohio St. 255; *Savage v. Stevens*, 128 Mass. 255; *Bryant v. Bigelow Carpet Co.*, 131 Id. 503; *Chamberlin v. Murphy*, 41 Vt. 118; *Blann v. Crocheron*, 19 Ala. 647; 54 Am. Dec. 203, and cases collected in note 205; and he is entitled to full satisfaction for his injuries, and to but one satisfaction: *Bloss v. Phymale*, 3 W. Va. 393; 100 Am. Dec. 752; *Mets v. Kretsinger*, 40 Iowa, 236; *Lord v. Tiffany*, 98 N. Y. 412. Having accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected, in equity and good conscience, that the law will not permit him to recover again for the same damages: *Lovejoy v. Murray*, 3 Wall. 1. Hence all the authorities agree in support of the doctrine that satisfaction from one joint wrong-doer, whether received before or after recovery, extinguishes the right as against the others: *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330; *Sheldon v. Kibbe*, 3 Conn. 214; 8 Am. Dec. 176; *Ayer v. Ashmead*, 31 Conn. 447; 83 Am. Dec. 154; *Gunther v. Lee*, 45 Md. 60; 24 Am. Rep. 504; *Urton v. Price*, 57 Cal. 270; *Stone v. Dickinson*, 5 Allen, 29; 81 Am. Dec. 727; 7 Allen, 26, on a different appeal; *Brown v. Cambridge*, 3 Id. 474; *Bird v. Randall*, 3 Barr. 1345; *Lewis v. Jones*, 4 Barn. & C. 506. Each joint wrong-doer being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole wrong done, and a discharge of all concerned: *Ellis v. Bitzer*, 2 Ohio, 89; 15 Am. Dec. 534. And the law as settled in England is, that a judgment in an action against one of two joint wrong-doers, of itself, without satisfaction or execution, is a sufficient bar to an action against the other for the same cause: *King v. Hoare*, 13 Mees. & W. 494; *Brinsmead v. Harrison*, L. R. 6 Com. P. 584; L. R. 7 Com. P. 547; but the opposite view has been generally adopted in this country: See *United Society of Shakers v. Underwood*, 11 Bush, 265; 21 Am. Rep. 214; *Blann v. Crocheron*, 19 Ala. 647; 54 Am. Dec. 203, and note 205, where the authorities are collected.

From a very early period, it has been held that the absolute release of one joint trespasser from his liability discharges all who may have participated in the tortious act: See *Merryweather v. Wizan*, 8 Term Rep. 186; *Thurman v. Wild*, 11 Ad. & E. 453; *Ruble v. Turner*, 20 Hen. & M. 38; *Gilpatrick v. Hunter*, 24 Me. 18; *Ellis v. Bitzer*, 2 Ohio, 89; 15 Am. Dec. 534; *Delong v. Curtis*, 35 Hun, 94. And as a consideration is always implied in a release under seal, though not expressed on its face, a release by deed of one joint wrong-doer will discharge all. Upon the production of the release, the law conclusively presumes that the injured party has been fully satisfied for the wrong done; and this legal presumption cannot be changed or disproved by any parol evidence: *Ellis v. Eason*, 50 Wis. 138; 36 Am. Rep. 830; *Brooks v. Stuart*, 9 Ad. & E. 854; *Cocks v. Nash*, 9 Bing. 341; *Ruble v. Turner*, 2 Hen. & M. 38; *Union Bank v. Hall*, 5 Fla. 409; *Thurman v. Wild*, 11 Ad. & E. 453. And where the plaintiff, in an action against several wrong-doers, executed to one of them a release under seal acknowledging full satisfaction for the tort, but reserving his claim against the others, it was held that the reservation was inoperative, and that the release inured to the benefit of all the defendants: *Gunther v. Lee*, 45 Md. 60; 24 Am. Rep. 504; and see *Mitchell v. Allen*, 25 Hun, 543; *Ellis v. Bitzer*, 2 Ohio, 89; 15 Am. Dec. 534. But a release not by deed, and without consideration, is void: *Jackson v. Stackhouse*, 1 Cow. 122; 13 Am. Dec. 514; *Deneng v. Baily*, 9 Wend. 336. And when there is no technical release under seal, full satisfaction in fact must be shown to

work a full discharge: *Lovejoy v. Murray*, 3 Wall. 1; *Harriman v. Harriman*, 12 Gray, 341; *Bemis v. Hoesley*, 16 Id. 63; *Turner v. Hitchcock*, 20 Iowa, 331; *Line v. Nelson*, 38 N. J. L. 358; and a partial satisfaction by one of the wrong-doers only works a discharge *pro tanto* as to the others: *Snos v. Chandler*, 10 N. H. 92; 34 Am. Dec. 140; *McCrillis v. Hawes*, 38 Me. 566; *Merchants' Bank v. Curtis*, 37 Barb. 319; *Chamberlin v. Murphy*, 41 Vt. 118; *Bailey v. Berry*, Sup. Ct. Cin.; 8 Am. Law Reg., N. S., 270. In other words, when the contract which is set up as a release of one of several joint wrong-doers is not a technical release, or is not of such a nature that the law deems it conclusive evidence that the injured person has been satisfied for the wrong, then it becomes a question of fact for the jury whether what he has received of the one wrong-doer was received in full satisfaction of his wrong; and if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrong-doers: *Ellis v. Eeson*, 50 Wis. 138; 36 Am. Rep. 830. The question of fact is for the jury, at least in all cases where the amount of the damages does not rest chiefly in the discretion of the jury, but is the subject of proof and computation: *Ellis v. Eeson*, 50 Wis. 138; 36 Am. Rep. 830; and see *Ellis v. Bitzer*, 2 Ohio, 295; 15 Am. Dec. 534; *Eastman v. Grant*, 34 Vt. 390; *Brown v. Cambridge*, 3 Allen, 475; *Stone v. Dickinson*, 5 Id. 29; 81 Am. Dec. 727; and the cases in which it is held that an agreement by the injured party discharging one or more of several joint wrong-doers was a discharge of all will generally be found to proceed upon the ground that the contract evidencing the discharge showed that the plaintiff had received a full compensation and satisfaction for all his injuries from the person discharged: See *Gunther v. Lee*, 45 Md. 60; 24 Am. Rep. 504; *Bloss v. Pymale*, 3 W. Va. 393; 100 Am. Dec. 752; *Irvine v. Milbank*, 15 Abb. Pr., N. S., 378; *Urten v. Price*, 57 Cal. 270; *Matthews v. Chicopee Mfg. Co.*, 3 Robt. 712; to which may be added the principal case. And in cases where the damages are definitely ascertainable and divisible, the rule is recognized that they may be settled for in part by one wrong-doer, and that such settlement does not prevent an action against the others for the remainder, though it must be considered by the jury in determining the amount of their verdict: *Snos v. Chandler*, 10 N. H. 92; 34 Am. Dec. 140; *Chamberlin v. Murphy*, 41 Vt. 110; *Bailey v. Berry*, Sup. Ct. Cin., 8 Am. Law Reg., N. S., 270; *Ellis v. Eeson*, 50 Wis. 138; 36 Am. Rep. 830; *Pogel v. Meilke*, 60 Wis. 248; *McCrillis v. Hawes*, 38 Me. 566; *Knapp v. Roche*, 94 N. Y. 329.

It has been held that the acceptance of the note of one of several co-trespassers in satisfaction of the wrong done by him releases the others, although the note remains unpaid, and is brought into court to be canceled: *Ellis v. Bitzer*, 2 Ohio, 89; 15 Am. Rep. 534. But see *Ayer v. Achmead*, 31 Conn. 447. So the subsequent marriage of the plaintiff in an action of trespass with one of the co-trespassers operates to discharge all the others: *Turner v. Hitchcock*, 20 Iowa, 310. An agreement not to sue one of several wrong-doers does not release the others, yet to avoid circuity of actions the party with whom the agreement has been made may set it up as a bar to an action brought against him alone for the damages sustained: *Lacy v. Kynaston*, 2 Salk. 575; 1 Ld. Raym. 689; 12 Mod. 584; and see *Dean v. Newhall*, 8 Term Rep. 168; *Brown v. Marsh*, 7 Vt. 326; *Spencer v. Williams*, 2 Id. 212; *Eastman v. Grant*, 34 Id. 390; *Couch v. Mills*, 21 Wend. 424; *McAllister v. Sprague*, 34 Me. 296. And where there has not been a full accord and satisfaction, the tendency of the courts is to construe the transaction into a covenant not to sue, rather than a release: *Russell v. Adderton*, 64 N. C. 417; *Line v. Nelson*, 38 N. J. L. 358.

Although the general rule is, that a party injured by the wrongful acts of others is entitled to but one satisfaction, and that an accord and satisfaction by, or a release or other discharge by, the voluntary act of the party injured, of one of two or more joint wrong-doers, is a discharge of all, yet an attorney at law, as such merely, cannot settle a suit and give a release concluding his client in relation to the subject in litigation, although it is within his authority to discontinue the action: *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628. So a release to a person as a joint wrong-doer who is not in fact liable to the releasor will not destroy the right of action against those who are liable: *Wilson v. Reed*, 3 Johns. 175; *Turner v. Hückcock*, 20 Iowa, 310. So the rule that a release to one of several joint wrong-doers releases all was held to have no application in a case where the release was executed under a misapprehension that the money was given as a charity, and there was no evidence of a tort on the part of the person making the payment: *Ryan v. Waterliet et c. R. R. Co.*, Sup. Ct. N. Y., 3 N. Y. Week. Dig. 251.

THROPP v. SUSQUEHANNA MUT. FIRE INS. CO.

[125 PENNSYLVANIA STATE, 427.]

INSURANCE — CONSTRUCTION OF BY-LAW OF MUTUAL INSURANCE COMPANY, AND VALIDITY OF ASSESSMENTS MADE THEREUNDER. — The by-law of a mutual insurance company which simply adds to the general rule of law, that losses shall be paid by the policies in force at the time of their occurrence, another provision, that if the assessment against such policies prove insufficient, then all existing policies, even though issued subsequently to the losses, shall be liable to make up the deficiency, is not unlawful, and assessments declared and levied on the basis thereof are regular and lawful: *Approving Susquehanna Mut. F. Ins. Co. v. Stauffer*, 125 Pa. St. 416.

INSURANCE — EVIDENCE. — Where action is brought by mutual insurance company to recover assessments on premium notes, and the evidence is that the assessments were made for losses only, it is matter irrelevant to the issue whether officers of the company improperly received compensation for their services, and testimony offered as to such compensation is properly refused.

INSURANCE — ERROR FROM MISCALCULATION NOT DEFEATING RECOVERY. — A recovery by the plaintiff in such action of the amounts really due will not be defeated by reason of a variance between the amounts of the assessments as stated in the notices to the defendant, and the amounts as proved at the trial, if the error arose from miscalculation merely. Mere errors of statements of amounts do not destroy the true claim.

INSURANCE — SET-OFF AGAINST JUDGMENT RECOVERED ON POLICY. — Refusal by court to allow mutual insurance company to set off its claims for interest and assessments due upon a policy-holder's premium notes against a judgment recovered on the policy by such holder for property destroyed is not an adjudication upon the claims as a cause of action, and will not bar a recovery in a subsequent action therefor.

SET-OFF AGAINST JUDGMENT IS NOT OF RIGHT, but of grace, and is only granted where a special equity is shown to justify it.

INSURANCE — LIABILITY TO ASSESSMENT AFTER DESTRUCTION OF INSURED PROPERTY. — Where the contract of insurance stipulates for the pay-

ment of assessments by the insured for all losses during the term of the policy, and provides for a surrender of the policy in case of the sale of the land, but no surrender is made, the liability to assessments continues during the term, and is not terminated by the destruction of the insured buildings by fire and the subsequent sale of the land.

ACTION in *assumpsit* brought February 6, 1884, by the Susquehanna Mutual Fire Insurance Company against J. E. Thropp to recover assessments on an interest-bearing premium note in the sum of \$560, given by Thropp to the company upon taking out a policy of insurance issued to him by the company on May 25, 1877, on certain of his property for the period of five years from that date. Shortly after the policy was issued, Thropp's insured property was totally destroyed by fire, but the company refused to pay the loss. Thropp thereupon brought suit on his policy in the common pleas of Dauphin County, and on September 15, 1881, had a judgment in his favor. On October 3, 1882, the company petitioned said court for leave to set off against the judgment its claims for interest and assessments then due on Thropp's premium note, which leave was refused. On March 19, 1881, Thropp conveyed away his property. After the determination of Thropp's suit against the company upon his policy, notices of assessments were sent to him, one of which recited an amount greater than was subsequently admitted was due thereon. Thropp refused to pay them, claiming certain irregularities in their assessment, whereupon the company brought this suit. At the trial, the secretary of the company was called to explain the mode of levying assessments, and testified, in substance, that as far as possible the assessment to pay each loss was laid exclusively upon the notes given for policies in force at the time the loss occurred, omitting notes given for policies issued after the loss, but before the assessment was levied. The defendant claimed that this mode of assessment was invalid under the by-laws, one of which is as follows: "Sec. 31. If at any time hereafter an assessment shall be made, the amount to be levied on premium notes shall be rated according to the following classification, to wit: 1. All premium notes in force at the time the assessment may be declared shall be liable to assessment for all losses adjusted, unadjusted, and unpaid at that time, subject to abatement as hereinafter specified; 2. All premium notes which have expired, and are not in force at the time such assessment is declared, shall nevertheless be liable to assessment for all un-

paid losses which existed at the time of the expiration of such premium note or notes *pro rata* with all other premium notes then in force, and the amount thus ascertained and levied upon such expired premium notes to be deducted from the gross amount of liabilities of the company for which such assessment is to be made, and balance of liabilities then remaining to be assessed upon the premium notes then in force." The defendant's offer of testimony as to the compensation received by the officers of the company was refused. The jury returned a verdict for the plaintiff, and a new trial having been subsequently denied, and judgment entered on the verdict, the defendant assigned error.

Louis M. Childs and Montgomery Evans, for the plaintiff in error.

Charles Hunsicker, for the defendant in error.

MITCHELL, J. The principal question of law raised in the present case was upon the validity of the assessments made by the defendant in error. The case was tried before the publication of the opinion of this court in *Insurance Co. v. Gackebach*, 115 Pa. St. 492, and the rulings of the learned judge below were at variance with the decision in that case. On an examination, however, of a correct copy of the by-law under which the assessments were made, it has appeared clearly that this court, speaking through our late brother Trunkey, was misled by an incorrect copy in the record of that case, and the mistake has been rectified in the opinion in *Susquehanna M. F. Ins. Co. v. Stauffer*, filed herewith: See 125 Pa. St. 416.

The main contention in the present case having been thus settled, the others can be disposed of without difficulty.

The first assignment of error is to the refusal to permit the defendant to ask the secretary what salary he received in the year 1877. It is sufficient to say that the relevancy of the question was not apparent from any evidence then in the case, nor was any offer made to follow the question with such evidence. The ground assigned here was not pointed out to the judge at the trial, nor is the evidence shown to us which would support it. The evidence is, that the assessments were made for losses only; and whether the secretary or directors improperly received compensation for their services, though important to the policy-holders as members of the association, was not relevant to the issue on trial.

Several of the assignments relate to the variance between the amounts of the assessments as stated in the notices to the defendant and the amounts as proved at the trial. The instruction by the learned judge below, that an error in the amount arising from miscalculation would not prevent the plaintiff from recovering the amount really due, was entirely correct. Mere errors of statement of amounts do not destroy the true claim.

Other assignments raise the question whether the refusal of the court of common pleas of Dauphin County to allow the company to set off or defalk its claims for interest on defendant's deposit-note, and the assessments then due, was an adjudication which barred these items in the present action. It is difficult to see why it should do so. It was not an adjudication of the right of action on the assessments, but of the company's right to use them in payment of a particular judgment. Set-off against a judgment is not of right, but of grace, and is only granted where a special equity is shown to justify it. What reasons moved the Dauphin County court in its refusal, we do not know, nor is it material that we should. It is sufficient that the adjudication was not upon the claims as a cause of action. *Susquehanna Ins. Co.'s Appeal*, 105 Pa. St. 615, is not contrary to this view, as in that case the court simply distributed a fund paid in for the very purpose. Even if it had gone further, and decided that under the circumstances equity would allow the set-off against a judgment, it would not now follow that the refusal of the Dauphin County court to allow the set-off in this case was an adjudication of the right of action. In the very case in 105 Pennsylvania State it was held that even a previous action for the assessments, and judgment against the company therein, were not a bar to the company's claim on the assessments, inasmuch as it was shown that the failure of the plaintiff was for want of notice of the assessments given to the defendant in the action.

The only remaining question is, whether the destruction of the buildings by fire, and the subsequent sale of the land, terminated plaintiff in error's liability to further assessments. It may be conceded that, ordinarily, and in the absence of a special contract, this result would follow, as held in *Wilson v. Insurance Co.*, 19 Pa. St. 372; but it is quite clear that the law of this case is otherwise. The contract stipulated for the payment of the assessments that should be made for all losses

during the term of the policy, without regard to the destruction of the property or other hardships. There was a provision for surrender of the policy in case of sale of the land, but no surrender was made under it. In the language of our brother Green, in 105 Id. 624, "whatever may be said in reference to the reasonable or unreasonable character of a contract with such provisions, it is enough for the purposes of this case to know that the contract of these parties is of this character. . . . If parties make such contracts, they must be bound by them."

The case was well tried by the learned president of the common pleas, and the questions arising in it properly ruled.

The judgment is affirmed.

MUTUAL INSURANCE COMPANY — VALIDITY OF ASSESSMENTS MADE THEREUNDER. — A by-law, which adds to the general rule that losses shall be paid by the policies in force at the time of their occurrence the additional provision that if the assessment against such policies prove insufficient, then all existing policies, even though subsequently issued, shall be assessed to fill the deficiency, is lawful and valid: *Susquehanna Mutual Fire Ins. Co. v. Stauffer*, 125 Pa. St. 416.

PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD COMPANY v. CLEARY.

[125 PENNSYLVANIA STATE, 442.]

JUDICIAL SALE — PURCHASER AT SHERIFF'S SALE ACQUIRES INCHOATE TITLE in the land purchased by virtue of his bid and its acceptance by the sheriff; and the subsequent acknowledgment and delivery of the deed provides the purchaser with the evidence of his title, which relates to and takes effect as of the date of the sale recited in it.

EMINENT DOMAIN — TITLE SUFFICIENT TO MAINTAIN PROCEEDINGS FOR DAMAGES FOR LAND TAKEN. — Proceeding to assess damages against a railroad company for entering land under the right of eminent domain is properly brought in the name of an administrator who bought the land at sheriff's sale, under a judgment obtained against his intestate (the former owner) in his lifetime, the entry by the company having been made after such purchase, though prior to the execution, acknowledgment, and delivery of the deed. Whether such purchaser holds the title as owner, or as trustee for the heirs at law of his intestate, is a question determinable after the damages have been fixed and the money paid into court.

EMINENT DOMAIN — MEASURE OF DAMAGES FOR LAND TAKEN BY VIRTUE OF. — In a proceeding to assess damages for land taken for railroad purposes, it is proper to inquire what the whole tract was worth, having in view the purposes for which it was best adapted; but testimony showing how many building-lots the tract could be divided into, and what such

lots would be worth separately, is inadmissible; and equally incompetent is evidence offered to show that the owner had declined to sell or lease the land, or the reasons he gave therefor, his views upon this subject being irrelevant to the inquiry before the jury. The true measure of damages is found in the difference between the fair selling value of the land before and after the entry complained of.

In May, 1887, M. J. Cleary commenced a proceeding for the assessment of damages against the Pennsylvania Schuylkill Valley Railroad Company for land taken by the company for railroad purposes. Viewers were appointed, and filed their report in September following, assessing the damages at \$4,750. Cleary appealed from the award, and it was agreed that the action should be in the form of trespass under the plea of not guilty. The facts appearing at the trial, so far as material, are stated in the opinion. The plaintiff had a verdict in his favor for \$6,669. Judgment having been entered thereon, the defendant assigned error.

Guy E. Farquhar, for the plaintiff in error.

J. W. Moyer, James Ryon, and John A. Nash, for the defendant in error.

WILLIAMS, J. The court below was right in the admission of the evidence which is the subject of the first assignment of error. The lot of land, over which the line of the road belonging to the plaintiff in error had been laid, belonged, prior to 1882, to James Cleary. He died in that year, and his title descended to his heirs at law, of whom M. J. Cleary is one, and letters of administration upon his estate were regularly issued to M. J. Cleary. A judgment had been recovered against James Cleary in his lifetime by A. E. Beck in the common pleas of Schuylkill County. After the death of James Cleary it was regularly revived against the administrator, and on the 11th of July, 1885, the lot in controversy was brought to sale by the sheriff, and sold to M. J. Cleary. On the 31st of July, 1885, the railroad company entered and located their line of railroad. This proceeding for the assessment of damages was begun by M. J. Cleary in May, 1887. The acknowledgment and delivery of the sheriff's deed did not take place until April, 1888. It is well settled, however, that a purchaser at sheriff's sale acquires an inchoate title in the land purchased by virtue of his bid and its acceptance by the sheriff. The subsequent acknowledgment and delivery of the deed provides the purchaser with the evidence of his

title, which relates to and takes effect as of the date of the sale recited in it. The title of M. J. Cleary to this land vested at the time of his purchase from the sheriff on the 11th of July, 1885, notwithstanding the fact that he was not provided with the legal evidence of his title until 1888. As his purchase was prior to the entry by the railroad company, this proceeding to assess damages against the company was properly begun in his name. After the damages have been fixed, and the money paid into court, it may be the question of the character of the plaintiff's holding will be raised, and the court called upon to decide whether he holds the title as owner, or as trustee for the heirs at law of James Cleary; but that question is unimportant now. The title being in him, the damages are properly assessed at his instance. The first, second, and third assignments of error are therefore dismissed.

The fourth and fifth assignments raise a more serious question. The true measure of the damages sustained by any given lot of land is found in the difference between its selling value before and after the entry complained of: *Reading etc. R. R. Co. v. Balthasar*, 119 Pa. St. 483. It is proper to consider for what purpose it may be used to advantage, in order to determine for what price it will sell. It may be salable as a site for the erection of a hotel, a factory, a dwelling, or a wharf, but it is not proper to lay before the jury proof of what the hotel or other structure would cost, together with proof of the value of the lot with such structure upon it, and treat the difference between these sums as the value of the lot. Such a method would be speculative and fanciful. Equally improper is evidence showing how many building-lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided, that is to be valued. The learned judge intended to guard this point in his charge to the jury, yet he seems to have left a question to the jury with which they had nothing to do. He said: "It would scarcely be a fair estimate of the value of the property to take this property and divide it all up into town lots, and say that each town lot is worth so much money, and that therefore the whole property is worth that amount of money; because that presupposes that the moment that property is cut into town lots it could all be sold off at that figure. That is a question for you whether that would be the case,

particularly with a piece of ground on the outskirts of a town where perhaps the evidence would not show that the tide of improvement was going. It is a question of fact for the jury."

We do not agree with the learned judge that there was any such question for the jury in this case. The jury are to value the tract of land, and that only. They are not to determine how it could best be divided into building-lots, nor conjecture how fast they could be sold, nor at what price per lot. A speculator or investor in deciding what price he could afford to pay would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. This is a rule that is well settled, and the court should have drawn the attention of the jury to it so as to have left no room for uncertainty on their part. They should have been told that they had nothing to do with the subdivision of this tract, the price of the lots, or the probability of their sale; but that they were to ascertain the fair selling value of the land before and after the entry by the railroad company, in order to determine the actual damage done to its owner.

The court was also in error in admitting the evidence offered to show why James Cleary had declined to sell or lease the land, or the fact that he had done so. James Cleary might have had a reluctance to part with it for many reasons; he might have had a wise, or an unwise, confidence in its value as an investment, or a desire to see it occupied for some particular purpose, but his views upon this subject were not relevant to the inquiry before the jury. The questions before them were: first, What was this land worth before it was touched by the railroad? next, What was it worth as affected by the location of the road? When these questions were settled, the damages were ascertained.

Judgment reversed, and *verdict facias de novo* awarded.

JUDICIAL SALE.—A sheriff's deed to a purchaser at an execution sale transfers all the title which the defendant held when the execution lien attached to the realty, and takes precedence over all subsequent transfers and liens; and the sheriff's deed must be treated as relating back and taking effect upon the day when the execution lien was created: *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613, and note 619. The purchaser at an execution sale gets such an interest even before the execution of the sheriff's deed as he can

convey by quitclaim deed to another party: *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151. But the purchaser at an execution sale is not clothed with legal title until he has received the sheriff's deed, and only has a lien or equity in the purchased property: *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.

EMINENT DOMAIN — MEASURE OF DAMAGES. — The measure of damages in original proceedings to condemn land for railroad purposes is the difference between the value of the land as a whole before and after the construction of the road: *Wabash etc. R. R. Co. v. McDougall*, 126 Ill. 111; 9 Am. St. Rep. 539, and note 546, with the cases therein collected.

WISTAR'S APPEAL.

[126 PENNSYLVANIA STATE, 526.]

PARTITION — DISTRIBUTION OF PROCEEDS OF SALE BY ORPHANS' COURT, AND ALLOWANCE OF COMPENSATION TO TRUSTEE. — Where a trustee is appointed by the orphans' court in partition proceedings, and he sells the land, and the proceeds are paid into court in compliance with the terms of the order of sale, the court may adjudicate the trustee's account and make distribution without the intervention of an auditor; and although the trustee furnished no bond, an allowance to him for his services in conducting the sale, etc., of one per centum of the amount realized cannot be regarded as excessive, the sale being an advantageous one, largely the result of the trustee's personal efforts.

CO-TENANCY. — CO-TENANT HAS NO EQUITY TO PROVE AGAINST FUND RAISED BY SALE OF LAND, UNDER PROCEEDINGS IN PARTITION, claims for taxes and municipal assessments against the land paid by him during his exclusive possession and enjoyment thereof, which had continued for many years, he all the while ignoring the title of his co-owners and excluding them from any participation in the management or control of the land.

AUDIT of account of trustee appointed by the orphans' court to sell the real estate of Richard Wistar, deceased. The fund for distribution arose from the sale of the property by the trustee, the proceeds having been paid into court in compliance with the terms of the order of sale. By the will of Richard Wistar, admitted to probate in June, 1821, there was devised to his two daughters, Catherine and Sarah, his lot of land, containing about six and a half acres, to hold for their natural lives and the life of the survivor of them, and at the decease of the survivor the property was devised to the male issue then living of the testator's son Richard. Catherine died in 1822, and Sarah died in 1866, in possession. On the latter's death, Richard and W. L. Wistar, sons of the testator's son Richard, entered upon the devised real estate, and held exclusive possession for a number of years under the claim that they were the sole living male issue, and therefore the only parties enti-

tled. It was determined, in an action of ejectment brought in 1883, that the shares of Richard and William L. Wistar were two sixths only of the said real estate, and the remaining four sixths were awarded to grandsons of the testator's son Richard, the children of Richard's two daughters. In May, 1887, Elkins and Widener acquired an undivided moiety of the land, and thereafter the proceedings in partition were had, resulting in the sale of the land producing the fund for distribution. It was objected, on behalf of Richard and William L. Wistar, that the auditing judge should not adjudicate the account, but that an auditor should be appointed to hear claims and make distribution. The objection was overruled. The auditing judge allowed the trustee a commission of one per centum upon the amount of the proceeds of sale. Richard and William L. Wistar offered to prove that the taxes on the property from 1866 to 1883, inclusive, amounting to a large sum, had been wholly paid by them, and that they had also paid for municipal claims against the land in question a large amount, with the view to charge four sixths of these taxes and claims, with interest, against their co-tenants' share. The offer was ruled out. Richard and William L. Wistar excepted to the adjudication filed by the auditing judge, and the exceptions having been dismissed by the court below, the exceptants took this appeal.

William Gorman and F. Carroll Brewster, for the appellants.

J. Howard Gendell, J. B. Townsend, and John M. Scott, for the appellees.

STERRETT, J. Little, if anything, can be profitably added to what has been so well said by the learned judge of the orphans' court in support of its decree.

In view of all the circumstances, the allowance to the trustee for his services in conducting the sale, etc., measured as it was by one per centum of the amount realized; cannot be regarded as unreasonable. It is conceded on all hands that the services were efficient and valuable. If the trustee had been required to furnish security, the ordinary allowance would have been at least twice as much, and thus the expenses of sale would have been increased. The fact that the parties interested in the fund to the extent of two thirds are not dissatisfied with the allowance, is strongly persuasive of its reasonableness.

The offer to interject claims for contribution for taxes paid by two of the six tenants in common, during a period extending back to 1866, and for other claims against the land alleged to have been paid by them, was properly rejected. Ordinarily the only claims that, of right, can be made upon a fund raised by the sale of land, under proceedings in partition, are the expenses, including costs, and liens on the land at the time it is sold. The latter, by reason of the conversion of the land into money, retain their grasp on the fund, and must of course be paid out of it. The former are charges on the fund in the nature of a lien for cost of producing it, and are always deducted before distribution. But claims for contribution, such as were presented in this case, if allowable at all, must rest on an equitable basis.

In this case the appellants had no equity which, under the circumstances disclosed by the record, the court was bound to recognize. For many years they were in exclusive possession and enjoyment of the land, all the while ignoring the title of their co-owners, and excluding them from any participation in its management or control. During that time, they paid in their own right and for their own benefit, as they supposed, the sums of money for which they now claim contribution from the appellees, who represent two thirds of the fund realized from the sale in partition. It also appears that the owners of an undivided moiety of the land, in May, 1887, sold their interest to Messrs. Elkins and Widener. They, as vendees of that interest, now rightly claim one half the net proceeds of sale, less costs. Upon what principle, legal or equitable, can they be called upon to contribute to claims, none of which were liens on the land when they purchased, and of which it does not even appear that they had any notice?

The remaining specifications are also without merit. There is nothing in either of them that calls for a reversal or modification of the decree.

Decree affirmed, and appeal dismissed, at the costs of appellants.

Co-TENANCY. — Where a tenant in common has been fraudulently deprived of his interest in an oil leasehold by his co-tenants, and brings his suit to recover the value of his share in the oil produced, and by them converted to their own use, while they were in exclusive possession, such defendants cannot recoup from the value of the oil the expenses of its production: *Foster v. Weaver*, 118 Pa. St. 42; 4 Am. St. Rep. 572.

REAL ESTATE TITLE INSURANCE AND TRUST COMPANY'S APPEAL.

[125 PENNSYLVANIA STATE, 542.]

CONTRACTS. — WHERE WRITTEN AGREEMENT IS SILENT ON SUBJECT, and in absence of fraud or mistake, parol testimony is admissible to show a contemporaneous parol agreement as to the time during which the written agreement was intended by the parties to continue in force; and the testimony of a single witness, as, for instance, the person who drew the contract, is sufficient to establish such parol agreement, in the absence of testimony to the contrary.

BILL in equity filed by the Real Estate Title Insurance and Trust Company, administrator of W. R. Lafourcade, deceased, against S. W. Lambeth, to enforce performance for an account, and for the continued payment of royalties according to the terms of an agreement in substance set out below. The complainant's intestate, Lafourcade, died on June 20, 1884, and was, at the time of his death, the joint owner with Lambeth, the defendant, of certain letters patent for improvements in fly-fans. Prior to June 5, 1882, the said Lafourcade and Lambeth manufactured and sold said improvements in fly-fans in competition with each other; but on that date they entered into an agreement that Lafourcade would discontinue the sale of the said fly-fans, in consideration that Lambeth would pay to the Bridgeport Brass Company a certain price per dozen on the fans delivered by the said company to Lambeth, or to his order, after that date, and that said sum should be paid over by the said company to Lafourcade; and it was further agreed that Lambeth should pay over to Lafourcade a certain price per dozen upon fans which Lambeth then had in the hands of parties consigned for sale, and that the fans should be sold only at certain prices named. The agreement was signed by Lafourcade and Lambeth, and witnessed by the secretary of the Bridgeport Brass Company; and at its foot was a written agreement by said company to pay over to Lafourcade the specified sums per dozen when such amount should be paid over to it by Lambeth in accordance with the agreement. No time of duration for the agreement was mentioned therein. The agreement was drawn by the secretary of said company, and when submitted to both Lambeth and Lafourcade, objection was made that no time during which the agreement was to remain in force was mentioned; but it was then and there agreed that the contract should remain in force so long as it was for the mutual interest of both parties;

that Lafourcade could resume the sale of fans and Lambeth could discontinue the payment of the sums at any time. The circumstances under which the agreement came to be made, and the conversation that took place at the time of the execution of the written agreement, as above found by the master to whom the case was referred, were proven by the testimony of a single witness, to wit, the secretary of the Bridgeport Brass Company, which testimony was uncontradicted. In November, 1884, Lambeth notified the Bridgeport Brass Company that the agreement should terminate at the end of the season of 1884; and on December 6, 1884, said company paid over to the complainant, as administrator of the estate of Lafourcade, the sum of \$900.12 as the full amount remaining due under the agreement by Lambeth to the brass company and by the brass company to Lafourcade's estate to the close of the season of 1884. The answer of the defendant to the plaintiff's bill denied any duty on the part of the defendant to furnish an account or any liability to the plaintiff under the agreement. The master was of opinion that whether the agreement of the parties as to time was allowed to be proven by the parol testimony given in the case, or whether the agreement as to time was to be deduced by the interpretation of the written instrument alone, in either case the contract between Lambeth and Lafourcade was one which could be terminated at the will of either party upon proper notice; and as it appeared, from the evidence, that Lambeth did so terminate the agreement, and it further appearing that all the moneys due under said agreement up to the time of its termination had been paid to Lafourcade's estate, he was of the further opinion that the plaintiff's bill should be dismissed, with costs, and recommended that a decree to that effect should be entered. The plaintiff filed exceptions to the master's report, and the said exceptions, being overruled by the master, were renewed before the court, and after argument were dismissed, and a decree entered that the bill be dismissed at the cost of the plaintiff. Thereupon the plaintiff took this appeal.

Horace Pettit and H. C. Thompson, for the appellant.

William A. Manderson and F. Carroll Brewster, for the appellee.

By COURT. There appears to be nothing in this record that requires a reversal of the decree. The written agreement set out in the bill being silent as to how long the same was

intended to continue in force, it was clearly competent for the defendant to prove by oral testimony that the parties did not intend to bind themselves by said agreement for any definite period of time, but purposely left that to be settled either by a contemporaneous or subsequent agreement. The competency of parol evidence for such purpose as that is recognized in numerous cases, among which are *Greenawalt v. Kohne*, 85 Pa. St. 369; *Brown v. Morange*, 108 Id. 69; *Thudium v. Yost*, 20 Week. Not. 217; *Thomas v. Loose*, 114 Pa. St. 35. The evidence on that subject was quite sufficient to warrant the master in finding that the parties did make a contemporaneous agreement that their written contract should continue in force "only so long as both parties should desire for their mutual advantage to continue it." He also found, upon sufficient evidence, that defendant, in pursuance thereof, did terminate the contract. In view of these and other facts found by the learned master, there was no error in dismissing the bill. Neither of the assignments of error is sustained.

Decree affirmed, and appeal dismissed, at appellant's costs.

WRITTEN CONTRACTS, PAROL TESTIMONY TO ADD TO OR EXPLAIN: See *Sullivan v. Lear*, 23 Fla. 463; *ante*, p. 383, and extended note 393-395; *Appeal of Cornwall and Lebanon R. R. Co.*, 125 Pa. St. 232; *ante*, p. 889, and extended note, with the cases therein collected. Parol testimony that a limitation as to the use of realty formed a part of the consideration of a deed to such realty is admissible, although the deed itself is silent as to it: *Sutton v. Head*, 86 Ky. 156; 9 Am. St. Rep. 274.

STEVENSON v. FOX.

[125 PENNSYLVANIA STATE, 563.]

WILLS — CONSTRUCTION OF WORDS "DEATH WITHOUT ISSUE." — If a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death, or death without issue, before the testator. The first taker, in such case, is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life.

ACTION of ejectment brought on February 26, 1886, by William J. Stevenson against Henry K. Fox, executor of Joseph B. Stevenson, deceased, and three others, the defendants being in possession. The jury found a verdict for the plaintiff, subject to a question of law reserved, arising upon the facts. It

appeared that Ann Stevenson in her lifetime was seised in fee-simple of the premises in question, and being so seised, died in February, 1877, being then a widow, and leaving surviving her, among others, two sons, Joseph B. Stevenson and William J. Stevenson. Her last will and testament, dated April 7, 1870, contained a provision as follows: "Item: I give and bequeath to my son Joseph Stevenson the property on Howard Street and extending back to Waterloo Street, which property is now recorded in my name, and which has been given and bequeathed by my beloved husband, William Stevenson, with my consent; and it is my will and I do so direct and bequeath the same said property to my son Joseph Stevenson, to his heirs and assigns forever. Should my said son Joseph Stevenson depart this life without leaving lawful issue to survive him, it is my will and I do so direct that said property as would have fallen to my deceased son, I direct that it shall be given to my son William John Stevenson, provided that the lawful issue of such deceased son shall be entitled to such property." Ann Stevenson survived her husband, and both sons survived their parents. William John Stevenson is the plaintiff in the present action, the property on Howard Street devised in said will is the premises sued for, and Joseph B. Stevenson died in December, 1884. The question of law reserved for the consideration of the court in bank was, whether, upon the facts stated, the title to the premises in question became vested in William J. Stevenson upon the death of his brother Joseph. Judgment on the question reserved was entered for the defendants, whereupon the plaintiff took this writ.

James C. Sellers and Charles L. Bourguignon, for the plaintiff in error.

Henry C. Thompson, for the defendants in error.

By COURT. This case is ruled by *Mickley's Appeal*, 92 Pa. St. 514, and *Fitswater's Appeal*, 94 Id. 141, where it was held that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death, or death without issue, before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life. An examination of the will of Ann Stevenson

shows that the application of this rule will carry out the manifest intent of the testator. She devises the property in controversy "to my son Joseph Stevenson, to his heirs and assigns forever. Should my said son Joseph Stevenson depart this life without leaving lawful issue to survive him, it is my will and I so direct that said property as would have fallen to my deceased son, I direct that it shall be given to my son William John Stevenson, provided that the lawful issue of such deceased son shall be entitled to such property." It is plain that her son Joseph, the first taker, was the first object of her bounty. She gives him an estate in fee, but if he should die before her without issue, then the share which Joseph would have taken had he lived is to go to her son William John Stevenson. There is nothing here upon which to hang even a doubt.

Judgment affirmed.

WILLS—CONSTRUCTION OF THE WORDS "DYING WITHOUT ISSUE": See *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92; *Matter of New York etc. R. R. Co.*, 105 N. Y. 89; 59 Am. Rep. 478; *Quackenbush v. Kingsland*, 102 N. Y. 128; 55 Am. Rep. 771, and extended note; *Cumbe v. Cumbe*, 67 Md. 11; 1 Am. St. Rep. 359; *Hill v. Hill*, 74 Pa. St. 173; 15 Am. Rep. 545; *Allender's Lessee v. Sussan*, 33 Md. 11; 3 Am. Rep. 171; *Presley v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396; *Lewis v. Claiborne*, 5 Yerg. 309; 25 Am. Dec. 270.

PHILADELPHIA AND READING R. R. Co. v. BECK.

[126 PENNSYLVANIA STATE, 620.]

COMMON CARRIERS—LIABILITY OF CARRIER FOR BREACH OF CONTRACT.—

Where a railroad company undertakes to forward goods by rail, in accordance with the shipper's instructions, but, in disregard of such instructions, forwards them by steamer, and the goods are lost by fire on the steamer, the carrier is liable for the loss in an action on the contract. In such case, the principle of proximate cause is immaterial, and cannot be invoked.

ACTION by T. S. Beck against the Philadelphia and Reading Railroad Company to recover for the loss of goods which the defendant undertook to forward. The material facts appear in the opinion. The verdict was for the plaintiff, and judgment being entered thereon, the defendant assigned error. The answer of the court below to the defendant's fourth point, referred to in the opinion, is as follows: "This is a question of a contract between the plaintiff and the defendant, and if the

defendant broke its contract, and loss resulted from the failure, it was not a case of negligence, whether the injury resulted from a proximate or any remote cause connected with the loss of these goods. The question is as to whether there was such a contract as I have referred to, where the defendant undertook to dispatch them in a particular way, whether it kept that contract or whether it broke it; and if the jury believe that the defendant broke its contract, and that the loss resulted to the plaintiff, the plaintiff would be entitled to recover his loss as against the defendant."

Thomas Hart, Jr., for the plaintiff in error.

William C. Gross and Thomas F. Gross, for the defendant in error.

BY COURT. We do not think the question of proximate cause has anything to do with this case. It was not a suit to recover damages for the negligence of the defendant company, but for its breach of contract in not forwarding the cigars according to instructions. The plaintiff lived at Akron, in the county of Lancaster, Pennsylvania, and he shipped over defendant's road five cases of cigars to Benhayon and Gonzales, St. Augustine, Florida. Each case was marked "via Philadelphia, care of Atlantic Coast Line, by fast freight." When the cars reached Philadelphia, the defendant company, instead of shipping them as directed by rail, delivered the said five cases to the Ocean Steamship Company of Savannah, and sent them by sea. They were destroyed by fire *en route*.

The statement filed by the plaintiff gives some color to the allegation that the suit was for negligence. It avers that "in consequence of the carelessness, negligence, and improper conduct of the defendant in that behalf, the goods have never been delivered to the said consignees," etc. It is sometimes difficult, in the present free and easy mode of pleading, to ascertain accurately what is the precise cause of action. We are inclined to the opinion, however, that it was for breach of the contract to forward the cigars as directed. If the defendant company, for reasons of its own, saw fit to disregard instructions, and forward the cigars by steamer instead of by rail, and a loss resulted, it is too plain for argument the defendant would be responsible for such loss. It is begging the question to say that if the cigars had been shipped by rail, as directed, a loss might have occurred. In such case, the defendant would have incurred no responsibility.

This question is distinctly raised by the answer of the court below to the defendant's fourth point: See third assignment. As this was the only assignment pressed upon the argument, it is sufficient to say that we are entirely satisfied with the answer of the learned judge below to the point.

Judgment affirmed.

COMMON CARRIERS. — Deviation from a prescribed course or route is not justified by any ordinary or temporary obstruction; and the alteration in a voyage, whereby a vessel is carried over the sea instead of through a canal, renders the carrier responsible for the loss of the property, although the canal was temporarily obstructed: *Hand v. Baynes*, 4 Whart. 204; 33 Am. Dec. 54, and note 60, with cases therein cited; compare *Empire Transportation Co. v. Wallace*, 68 Pa. St. 302; 8 Am. Rep. 178.

TEMPLE v. BAKER.

[126 PENNSYLVANIA STATE, 694.]

NEGOTIABLE INSTRUMENTS. — LEGAL RELATION OF PARTIES TO BILL OR NOTE TO EACH OTHER IS PRESUMED to be that indicated by the order in which their names stand upon it. The maker is liable to the payee, the payee to his indorsee, and so on down the line of indorsements. The last indorsee is presumed to be the holder and owner of the note, and entitled to its proceeds.

NEGOTIABLE INSTRUMENTS. — LIABILITY ON IRREGULAR OR ANOMALOUS INDORSEMENT. — In an action to recover upon a note, it appeared that the defendant had indorsed the note, and had also written his name under the words "credit the drawer," on the face of the note, before the maker had signed it or the blank had been filled with the names of the payees, whose names were afterwards placed on the back of the note under the defendant's indorsement. In such case, the defendant's legal liability was that of second indorser only, and he incurred no liability to the payees. His indorsement could not be turned into a contract to guarantee payment of the note by parol testimony, because of the Pennsylvania statute of frauds of 1855; and the words "credit the drawer" implied no promise or undertaking on the part of the defendant, but were a direction to all persons to whom the note might be presented to treat with the drawer as the owner, notwithstanding the apparent title of the indorsee.

ACTION of *assumpsit* to recover upon a negotiable note. The facts appear in the opinion.

W. B. Brownall, for the plaintiff in error.

V. G. Robinson and William M. Hayes, for the defendants in error.

WILLIAMS, J. The point on which this case turned in the court below has not been decided in this state, so far as we have been able to learn from a somewhat extended examination.

Like all questions affecting the liability of parties to negotiable paper, it is important, and should be fully considered. It is raised upon a promissory note in the form following:—

“\$1,000.

WEST CHESTER, PA., October 25, 1882.

“158 days after date we promise to pay to the order of the administrators of Wm. Baker, at the First National Bank of West Chester, one thousand dollars, without defalcation, for value received.

“Credit the drawer.

ALFRED MANCILL & SON.

“BENNETT TEMPLE.”

On the back of the note were the following indorsements: Bennett Temple, Frederick W. Baker, James A. Baker, Lewis G. Baker.

The action is brought by the heirs at law of William Baker, who were the real payees and owners of the note, against Bennett Temple, whose indorsement appears on the note above that of the payees. The defense is, that while Temple might be liable to an indorsee, he is not liable to the payees who are of necessity the first indorsers. The jury before whom the case was tried returned a special verdict, covering the important questions of fact, as follows: 1. That the administrators were made payees for the use of the present plaintiffs, the parties in interest; 2. That Temple wrote his name under the words “credit the drawer,” and on the back of the note, before it was signed by the maker or the blanks filled up; 3. That the blanks were filled, the note signed, and the indorsement made by the administrators after the indorsement by Temple; 4. That the plaintiffs have exhausted their legal remedies against Mancill and Son, the makers. The court below entered judgment in favor of the plaintiffs.

To sustain this judgment, the liability of the defendant must rest either upon his indorsement or upon his direction to “credit the drawer.” His indorsement is of that sort described in our cases as an “anomalous” one. Though not the payee, his indorsement as to its order or place on the back of the note is first, that of the payees being under his. Before the passage of the statute of frauds in 1855, such an indorser was held liable to the payee as a guarantor, if such was

the understanding when the indorsement was made, and the payee might write a contract of guaranty above the name of such indorser, and sue upon it: *Leech v. Hill*, 4 Watts, 448; *Taylor v. McCune*, 11 Pa. St. 460. Since 1855, these cases have been necessarily departed from so far as to require a memorandum in writing, "signed by the party to be charged therewith," as the evidence of any contract of guaranty. The indorsement which imports only the commercial contract into which every indorser enters is not such a memorandum: *Jack v. Morrison*, 48 Id. 113; *Schafer v. Bank*, 59 Id. 144; 98 Am. Dec. 323; *Murray v. McKee*, 60 Pa. St. 35. The result of these cases has been to fix the position and legal liability of such an indorser as that of a second indorser. He is not liable to the payee; but if compelled by a later holder to pay, he has a right to proceed against the payee for reimbursement: *Slack v. Kirk*, 67 Id. 380; 5 Am. Rep. 438; *Eilbert v. Finkbeiner*, 68 Pa. St. 243; 8 Am. Rep. 176; *Hauer v. Patterson*, 84 Pa. St. 274. Such an indorser may still be converted into a guarantor by an agreement in writing signed by him; but, in the absence of the writing, his liability is fixed by the law merchant: *Eilbert v. Finkbeiner*, *supra*. It is clear, therefore, that the payees cannot recover against Bennett Temple as a guarantor, because of the statute of frauds; nor as an indorser, because they are prior parties to the note, and liable to him.

The learned judge of the court below seems to have been of this opinion, for he says: "If it was not for the words 'credit the drawer,' separately signed by the defendant, the case would be undoubtedly ruled in favor of the defendant by the case of *Schafer v. Bank*." He then proceeds to expand these words into the following: "A Mancill and Son have this day made their promissory note for one thousand dollars, which I have indorsed for their accommodation. The person to whom said note may be given for value is hereby authorized to give credit to said A. Mancill and Son." Now, unless this is the commercial meaning of the words "credit the drawer," the statute of frauds is as clearly violated as it would be by ingrafting such a guaranty upon a mere indorsement. What, therefore, do the words mean?

The legal relation of the parties to a bill or note to each other is presumed to be that indicated by the order in which their names stand upon it. The maker is liable to the payee, the payee to his indorsee, and so on down the line of indorse-

ments. The last indorsee is presumed to be the holder and owner of the note, and entitled to its proceeds. The note in question was made by Mancill and Son to the administrators of William Baker. They indorsed it. The indorsement of Temple being, in law, that of second indorser, he would appear to be entitled, as against the prior parties, to the proceeds of the note. The office of the memorandum we are considering is to advise the bank or other party to whom it may be offered that, contrary to the *prima facies* of the note, he is not the owner; that his indorsement is for the accommodation of the prior parties, and that, as between him and them, the drawer is entitled to have the proceeds of the note delivered to him, or passed to his credit. It is not a declaration that the maker is worthy of credit, nor a request that credit be given him upon the responsibility of the person signing the memorandum, but a statement that such person is not the owner in fact, though such in appearance, of the note to which the memorandum is attached, and disclaims any interest in its proceeds.

The court below was wrong in treating the words "credit the drawer" as implying an undertaking to pay, or as affording any basis for liability on the part of Temple. It was also wrong to say that "the jury could look at the note, the indorsement, the words 'credit the drawer,' and all the parol testimony, and say whether the contract was original or collateral." Since the statute of frauds, in 1855, parol testimony is not admissible to show a contract for the payment of the debt of another, if over twenty dollars in amount, and the jury had no right to consider the parol testimony on that subject. The indorsement was entitled only to the force which the general commercial law gives it; and the direction to credit the drawer was without significancy on the question of Temple's liability as an indorser. It neither increased nor diminished his liability in any particular.

It has been urged that *Roth v. Barner*, 2 Penny. 214, is an authority in support of the ruling of the court below, but we do not so understand it. In that case Kline, the irregular indorser, was held liable, not upon his indorsement, or upon the words "credit the drawer," but upon a distinct and independent agreement to pay the note, founded on a sufficient consideration. In the opinion of this court, delivered by our brother Sterrett, this appears very clearly. He says, on page 219: "In view of the explicit instructions thus given, the jury

must have found that the plaintiff in error, in consideration of obtaining the confession of judgment, promised absolutely and unconditionally to pay the balance due on the note, and that the judgment for five thousand dollars was given by Kline on the faith of that promise." Such a promise furnished a distinct basis for liability to the payee, on which alone the recovery against Roth rested.

On the whole case, we conclude that the plaintiffs, the payees, are not entitled to judgment on the special verdict, for the following reasons: 1. The irregular or anomalous indorsement of Temple imposed upon him the liabilities of second indorser, and did not make him liable to the payees; 2. His indorsement cannot be turned into a contract to guarantee payment of the note by parol testimony, because of the statute of frauds; 3. The words "credit the drawer" imply no promise or undertaking on the part of him who uses them, but are a direction to all persons to whom the note may be presented to treat with the drawer as the owner, notwithstanding the apparent title of the indorsee. This was the question on which the case turned in the court below, and the only one involved which was not well settled by our own cases.

It is apparent that the application of these principles to this case leaves the plaintiffs nothing upon which to stand, and the judgment is therefore reversed.

NEGOTIABLE INSTRUMENTS — SUCCESSIVE INDORSEMENTS. — Every indorser is responsible to every holder, and to every one whose name appears on the note subsequent to his own, and who has been compelled to pay the amount of the note: *McNeilly v. Patchen*, 23 Mo. 40; 66 Am. Dec. 651; *Connely v. Bowry*, 16 La. Ann. 106; 79 Am. Dec. 568; and so where several persons indorse a bill of exchange or any negotiable instrument, the legal effect is to subject them to each other in the order of their indorsement, the legal presumption being that the payee is the first indorser: *Rhinehart v. Schall*, 69 Md. 352. Where several persons indorse a bill of exchange or any negotiable instrument, the legal effect of their successive indorsements is to make them liable to each other in the order of time in which they signed their respective names as such indorsers; but this legal effect may be rebutted by parol proof to the contrary, such as proof that all the indorsers were accommodation indorsers, or co-sureties by an agreement among themselves: *Farwell v. Ensign*, 66 Mich. 600; *Rhinehart v. Schall*, 69 Md. 352.

NEGOTIABLE INSTRUMENTS — PRESUMPTION AS TO OWNERSHIP. — Possession of a note is *prima facie* evidence of ownership: *Doll v. Rivotti*, 20 La. Ann. 263; 96 Am. Dec. 399; *Kunkel v. Spooner*, 9 Md. 462; 66 Am. Dec. 49; *Way v. Richardson*, 3 Gray, 412; 63 Am. Dec. 760; but the mere possession by a third party of an unindorsed negotiable paper, payable to the order of the payee named therein, is not even *prima facie* evidence of title as against such payee: *Vastine v. Wilding*, 45 Mo. 89; 100 Am. Dec. 349. But the de-

livery of an unindorsed promissory note passes an equitable title: *Carpenter v. Tucker*, 26 N. C. 316. And although possession is ordinarily *prima facie* evidence of ownership, still an agent's possession of a promissory note, payable to his principal, is not such ownership as will authorize a recovery in the agent's name, his ownership being denied by a sworn plea: *Cobb v. Bryant*, 26 Ala. 316.

NEGOTIABLE INSTRUMENTS — INDORSERS. — A person who indorses a promissory note at the time it is executed, and before it is delivered to the payee, will be considered as a joint maker: *Schroeder v. Turner*, 68 Md. 506. The transferee of a promissory note, made payable to order of the maker, and by such maker indorsed in blank, holds such note with the presumption that it was negotiated for value before maturity without notice of equities existing between the prior parties to the note: *Cochran v. Dickerson*, 40 La. Ann. 127. Where the name of one, not the payee, is written on the back of a promissory note, he is *prima facie* an indorser: *Mcorman v. Wood*, 117 Ind. 144. Where a plaintiff is a *bona fide* holder of a draft for value before maturity, it makes no difference whether the drawer's name was signed before or after the maturity of such draft: *Hopps v. Savage*, 69 Md. 513; compare *Hubbard v. Matthews*, 54 N. Y. 42; 13 Am. Rep. 562; *Black v. Kirk*, 67 Pa. St. 280; 5 Am. Rep. 423; *Phelps v. Fletcher*, 50 N. Y. 69; 10 Am. Rep. 423.

INDEX TO THE NOTES.

- AGREEMENTS**, contemporaneous written, 894.
parol evidence of circumstances and conduct of parties, 894.
parol evidence of verbal to vary written, 894.
subsequent parol, 894.
- APPELLATE PROCEEDINGS**, errors which do not prejudice appellant, 267.
- ASSIGNMENT FOR BENEFIT OF CREDITORS**, preferences contained in other instruments, 563.
preferences prohibited by, 562.
preferences which cannot be set aside, 563.
- BANKS AND BANKING**, forged bills, payment of by, 616.
forged checks and bills, payment of is at peril of payer, 616.
- BOUNDARIES**, agreement establishing, 592.
estoppel to deny correctness of, 592.
- CARRIERS**, act of God and want of diligence, union of, in creating a loss, 363.
act of God which will excuse delay, 362.
agreeing to carry within a specified time, 360.
cannot refuse one and carry for another, 647.
compensation, always entitled to reasonable, 643.
damages, reasonable for want of diligence, 360.
delay, act of God excuses, 362.
delay caused by strikes, riots, and the like, 363.
delay caused partly by act of God and partly by fault of carrier, 363, 364.
delay in carrying perishable articles, 360.
delay, instances where deemed unreasonable, 361.
delay, unreasonable, what is, is a question for the jury, 361.
delay, what will excuse, 361, 362.
delivery, time within which must be made, 360.
discrimination against grain delivered at different elevators in the same city, 651.
discrimination against person for refusing exclusive patronage, 651.
discrimination against persons on account of race, color, or condition, 651.
discrimination by contracting to carry for one shipper cheaper than for his rivals, 652.
discrimination by, what forbidden, 647.
discrimination in favor of competitive points, 650.
discrimination in favor of passengers purchasing tickets at office, 650.
discrimination must be just and reasonable, 617.
discrimination in favor of large shippers, 649.
discrimination in favor of long distances, 650.
discrimination in favor of through-freight, 650.

- CARRIERS**, discrimination, statute forbidding all, whether constitutional, 642.
 discrimination, statutory and constitutional provisions regarding, 654, 655.
 discrimination, test to determine whether it is unjust, 649.
 discrimination, unreasonable, instances of, 652.
 discrimination, whether just or lawful, 649.
 express companies, discrimination between, 653.
 floods, snow, and the like, may excuse delay, 363, 363.
 live-stock, liability for delay in transportation, 361.
 locality, discrimination against, 648.
 measure of damages for delay in transportation, 361.
 not bound to treat all persons with absolute equality, 647.
 perishable property, liability for delay in transportation, 361.
 persons, discrimination against, 648.
 preferences, right of to grant, 648.
 right to carry for some persons without charge, 363.
 strike of employees, liability for damages resulting from, 647, 648.
- CONTEMPTS**, classification of, 214.
 convictions for, when void, 256.
 power of courts to punish is inherent, 212.
- CRIMINAL LAW**, adultery, conviction for, when sustainable, 222.
 adultery, essentials of statutory crime of, 21.
 assault, intent necessary to constitute offense of, 835.
 assault, instances of, 835.
 assault, what constitutes, 835.
 conspiracy, declarations of co-conspirators, 229.
corpus delicti, proof of, 201.
 former acquittal or conviction, when a defense, 223.
 larceny, elements of crime of, 19.
 murder of two persons when two distinct crimes, 228.
 negligent homicide, 119.
 reasonable doubt, what is, 159.
 seduction, definition of, 829.
- CRPS**, title to growing, in whom vested, 747.
- CUSTOM AND USAGE**, cannot contravene a rule of law, 692.
 may explain terms in a writing, 692.
- DAMAGES**, exemplary, when reasonable, 65.
 measure of for carrier's want of diligence, 335.
- DEFINITION**, of jurisdiction, 822.
 of negligence, 548.
 of rule in *Shelley's case*, 100.
 of seduction, 829.
- ELECTIONS**, ballots cannot be contradicted, 799, 802.
 ballots constitute best evidence of the will of the voters, 799.
 ballots, evidence of voter showing for whom he intended to vote, 800.
 ballots having a written name opposite a printed name, 800.
 ballots imperfectly sealed up, 799.
 ballots lose their presumptive purity, when, 799, 799.
 ballots, preservation and safe-keeping of must be shown, 799.
 ballots, sealing of boxes, necessity of, 799.
 ballots, technical inaccuracies in, 799.
 ballots, when constitute primary evidence, 778.
 irregularities in conducting, effect of, 776.
 voters, qualifications of, 777.

EMPLOYER AND EMPLOYEE, action by employee against one who procures his discharge, 478.

action for inciting actress to leave employment, 476.

action for enticing employee to leave employment, contract must be shown, 476.

action for enticing servant to leave employment, 476, 478.

action for procuring one not to enter on employment, 476.

EQUITY, reformation of deed in, 845.

ESTATE, heirs, effect of this word in creating a fee, 100, 101.

life, when vested in wife by a gift, 90.

power of disposition generally creates a fee, 100, 106.

See **SHELLEY'S CASE**.

EVIDENCE, opinions of witnesses, 466.

parol, of contemporaneous agreement, 393.

parol, to contradict receipts, 393.

parol, to add to, vary, or contradict writing, 395.

parol, to show antecedent or contemporaneous agreement, 394.

parol, to show execution of a writing, 394.

parol, to show what was litigated, 394.

EXEMPTION, lien of, relates to its date, 716.

levy under, what sufficient, 716.

partnership property, exemption of, 297.

EXPRESS COMPANIES, railroads must extend facilities to, 653.

railroads, whether may grant exclusive rights to, 653.

FRAUD, badges of, 759.

burden of proving, 758.

burden of proving, when parties occupy fiduciary relations, 758.

ignorance of, burden of proving, 758.

sufficiency of evidence of, 759.

FRAUDULENT CONVEYANCE, evidence of, 757.

intent of, when a question of law, and when of fact, 758.

HABEAS CORPUS, contempts, convictions for, not reviewable, 253.

errors or irregularities cannot be corrected by, 255.

HOMESTEAD, alienation or encumbrance of, 45, 46.

HUSBAND AND WIFE, alimony, allowance of, after decree of divorce, 858.

alimony, allowance of, when proper, 856.

deed from one to the other, 51.

pledge by wife to secure debt due husband, 242.

INSURANCE, concealment of material facts from the insurer, 53.

forfeitures, waiver of, 57.

other insurance, condition against, 53.

proof of loss, waiver of defects in, 72.

INSURANCE, LIFE, beneficiaries, assent of, necessary to surrender, 722.

beneficiaries, death of, effect on policy, 722, 724.

beneficiaries, interest of, cannot be defeated by assignment, 722.

beneficiaries, surrender and change without the assent of, 722.

for the benefit of children, share of each vests in his heirs, 721.

for the benefit of children, vests an interest in them as an immediate gift, 722.

heirs of beneficiaries, interest of, 722.

JUDGMENT, against one of several co-trespassers does not release the other, 307.

JURISDICTION, collateral attacks upon, 256.

defined, 321.

recitals in favor of, 27.

LACHES which preclude relief, 885.

MASTER AND SERVANT, action by servant against one procuring his discharge, 478.

action for attempting to entice servant to leave master, 447.

action for enticing servant away from service does not lie unless defendant knew of the employment, 477.

action for inducing servant to leave at end of his term of employment, 476.

action for inducing servant to leave, contract to serve must be proved, 476.

action for inducing servant to leave, who is serving under voidable contract, 477.

coercing servant to leave employment, 477.

cropper, enticing away, liability for, 475.

danger, order of foreman, servant assumes risks of, 502.

employing servants of another, liability for, 478.

enticing away servants, measure of damages in action for, 478.

enticing away servants is not a public offense, 478.

enticing away servants of another, liability for, 474, 475.

enticing away servant who is working by the piece, 476.

fellow-servants, engineer and brakeman, 569.

fellow-servants, exception to rule that master is not liable for injury of one servant from negligence of another, 570.

fellow-servants, instances of, 569.

harboring servant, liability for, 477.

intermeddling between, liability, 474, 475.

risks, assumption of damage by servants, 502.

MORTGAGE, to secure future advances, 293.

MUNICIPAL CORPORATION, bridges, liability for injuries resulting from defects in, 65.

streets, lighting of, is not a duty, 143.

streets of, use of, by street or other railways, 682.

NEGLECT, contributory, instances of, 66.

letting child go upon track of railway, 90.

letting child play in street, 90.

NEGOTIABLE INSTRUMENTS, amount which *bona fide* holder may recover on instrument obtained from maker by fraud, 321.

bona fide holder not affected by infirmities in inception of, 310.

bona fides of holder, when must be shown, 324, 326.

blank signed in, and wrongfully filled up, 316.

burden of proof concerning *bona fides* of holder, 323, 324.

delivery by maker, want of, as a defense, 313.

delivery in violation of condition imposed by maker, 314, 315.

delivery procured by theft, 313.

deposited in escrow, and delivered in violation of the condition, 315.

dures in origin of, does not affect *bona fide* holder, 310.

executed with conditions which may be detached, 317.

fraud in detaching conditions annexed, 317.

NEGOTIABLE INSTRUMENTS, fraud in inception being shown, holder must prove his *bona fide*, 325.

fraud in misrepresenting contents of, 318.

fraud in obtaining from payee does not release indorser, 311.

fraud in obtaining, statutes of Illinois, cases falling within, 312, 313.

fraud in origin of does not affect *bona fide* holder, 309.

fraud in origin of affects holder with notice or without value, 310.

fraud in origin of, holder acquiring after maturity, when affected by, 310.

fraud, holder acquiring after maturity, when affected by, 310.

fraud in origin, payee when not affected by, 310.

fraud in procuring delivery of, 313.

fraud in procuring, statutes concerning, 311.

fraud in representing that the paper was an instrument of a different character, 319.

fraud in reading to maker, 311.

given to defraud creditors, enforceable against maker, 31.

illiterate persons signing without knowing contents, 320.

ignorance of contents of, when no defense, 318.

indorsers, successive liability of, 930.

indorsers, when regarded as joint makers, 931.

negligence of makers in executing, 320.

obtained by fraud, and then taken as collateral security, 322.

possession of is *prima facie* evidence that possessor is holder *bona fide*, 323.

presumption as to ownership of, 930.

put in circulation in violation of instructions, 314.

signed in blank, and wrongfully filled up, 316.

surety, apparent principal, when may be shown to be a, 798.

transfer from *bona fide* holder, rights of, 322.

written over name signed on blank piece of paper, 317.

NEW TRIAL, newly discovered evidence as a ground for, 757.

PAYMENTS, application of, 616.

PRACTICE, new trial, time in which motion for may be made, 403.

PRINCIPAL AND AGENT, agent's authority, those who deal with must ascertain, 409.

personal liability of agent who contracts without authority, 234.

release of surety by extending time for payment, 243.

RAILWAYS, crossings, duties required at, 786.

culverts, liability for insufficient, 65.

negligence of, in not giving warning of danger, 66.

RELEASE of one of several wrong-doers, whether releases all, 907.

of one wrong-doer, reserving liability of the others, 907.

of one wrong-doer, when not conclusive, 908.

under seal, implies a consideration, 907.

without consideration, 907.

REPRESENTATIONS, false, when will avoid a contract, 350, 351.

REVERSIONER, statute of limitation against, 173.

SALE, vendor may retain title to personalty until full payment is made, 511,

warranty of quality, purchaser's suit for breach of, 691.

warranty, when exists, and what covered by, 879.

warranty, what constitutes, 879.

- SHELLEY'S CASE**, children, limitation to, 101, 105.
 conveyance to one and his children, 105.
 defined, 100.
 estate of remaindermen and life tenant must be of same quality, 103.
 heirs, what will limit the signification of this word, 102, 103.
 heirs of body, limitation to, 104.
 heirs must include all the heirs of the first taker, 103.
 instances of grants and devises controlled by, 105.
 issue, limitations to, 104.
 intention of grantor or testator, when prevents application of the rule, 103.
 limitation to one, and to be divided among his heirs after his death, 105.
 limitation over in the event of the failure of heirs, 105.
 limitation to children, 101, 105.
 limitation vesting estate in one and his general heirs creates an estate in fee, 100.
 power of disposition, effect of, 103.
 procreation, use of words of, exclude the operation of the rule, 105.
 restriction on power of alienation cannot affect, 104.
 statutes supplanting, 100.
- STATUTE OF FRAUDS**, part performance, what is, 250.
- STATUTE OF LIMITATIONS**, adverse possession, what is, 242, 243.
 adverse possession, what is sufficient to support, 207.
- TRESPASSERS**, liability of land-owner for injuries suffered by, 583.
 may be sued jointly or severally, 906.
 partial satisfaction by one of several, 908.
 payment of part of damages by one of several, 908.
 released by accepting a note from one of several, 908.
 release to, attorney at law cannot give, 909.
 satisfaction accepted from one releases all, 907.
- WATERCOURSE**, riparian owner's right to unobstructed flow and use of, 73.
- WILL**, agreement to make a, 51.
 instrument construed to be, 32.

INDEX.

ABATEMENT.

RIGHT TO REVIVE ACTION LOST BY LONG DELAY, WHEN. — The right of a plaintiff to revive and continue an action against the successors in interest of a deceased defendant may be lost by long delay in making the application, especially if the successors are purchasers in good faith, and the condition and value of the property have greatly changed, and the only witnesses by which the facts in issue can be established are dead. *Hoyce v. Nourse*, 700.

See NUISANCES.

ABSTRACT-BOOKS.

See TAXATION, 1.

ACKNOWLEDGMENTS.

UNISSUED CERTIFICATE OF ACKNOWLEDGMENT BY NOTARY PUBLIC IN VOID, though it is attested by his seal. *Clark v. Wilson*, 143.

See MARRIED WOMEN, 1, 2.

ADOPTION.

See PARENT AND CHILD, 1-4.

ADULTERY.

See CRIMINAL LAW, 9-12.

ADVERSE POSSESSION.

1. **ONE WHO BY MISTAKE AS TO BOUNDARIES** enters upon and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake. *Cayfield v. Clark*, 845.
2. **Where a party is in actual occupancy of a part of the land in dispute,** claiming the whole tract by adverse possession, he must show that his claim of title is founded on an instrument in writing to the whole of the disputed premises of which the portion occupied is a part. *Doyle v. Wade*, 334.
3. **POSSESSION TO BE ADVERSE MUST BE CONTINUOUS.** — A voluntary and intentional abandonment, without intention of returning and retaking possession, no matter how short, destroys adverse possession; but what is continuity of possession must to a great degree rest upon and be determined by the circumstances of each case, as the condition of the prop-

erty, the uses to which it is adapted or employed, the circumstances and situation of the possession, and the possessor's intention in regard to it. *Id.*

4. **STATUTE OF LIMITATIONS — VOID TAX DEED — COLOR OF TITLE —** Tax deed void on its face, but containing a proper description of the land, is sufficient to give color of title under which a claimant of title in good faith may found an adverse possession so as to set the statute of limitations in motion. It is a "written instrument" upon which a claim of title may be founded as being "a conveyance of the property in question," within the meaning of section 322 of the California Code of Civil Procedure, and is effective as notice of the extent of the possession and claim under it. *Wilson v. Atkinson*, 299.
5. **STATUTE OF LIMITATIONS — VOID DEED — CLAIM OF TITLE IN GOOD FAITH.** — Adverse occupant must enter and hold the land in good faith, believing his conveyance to be valid, in order to begin an adverse possession under a claim of title, within the meaning of section 322 of the California Code of Civil Procedure, providing that such occupant must found such claim "upon a written instrument as being a conveyance of the property in question." Knowledge that the instrument is void will vitiate the claim of title; but such knowledge must be actual, and not such as would arise from the legal construction of the instrument. *Id.*
6. **STATUTE OF LIMITATIONS — VOID TAX DEED ADMISSIBLE IN EVIDENCE TO DEFINE CHARACTER AND LIMIT EXTENT OF POSSESSION.** — Void tax deed is admissible in evidence, in an action of ejectment, for the purpose of defining the character and limiting the extent of the defendant's possession, when the evidence shows that the defendant entered and held possession of the land under the deed, claiming to be the owner of the property by reason of the conveyance, and that the plaintiff had actual notice of the adverse claim and its foundation. *Id.*

See EJECTMENT, 2.

AGENCY.

1. **AUTHORITY OF AGENT CONTAINED IN LETTERS SENT TO HIM DATES FROM MAILING of the letters.** *Ruggles v. American etc. Ins. Co.*, 674.
2. **LETTER STATING THAT "COMMISSION OF AUTHORITY AS AGENTS OF THIS COMPANY IN THE CITY OF BROOKLYN"** had been forwarded by the writer, an insurance company, to the persons addressed, constitutes the latter the general agents of the company. *Id.*
3. **GENERAL AGENT MAY BIND HIS PRINCIPALS BY ACT CONTRARY TO HIS SPECIAL INSTRUCTIONS**, if such act be within the scope of his authority. *Id.*
4. **CONTRACT — PERSONAL LIABILITY OF AGENT.** — Agent is not liable as a principal on a contract signed by him without authority, unless the contract contains apt words to charge him personally; and if he is not liable on the contract, he is only liable in an action to recover money paid or work or labor performed under the contract, or for special damages sustained by reason of the wrong in assuming to act without authority. *Wallace v. Bentley*, 231.
5. **FALSE REPRESENTATIONS BY AGENT OF AUTHORITY — SPECIAL DAMAGES.** — Agent is not liable for special damages by reason of false representations of authority to sell certain property, on account of which

the plaintiff failed to negotiate with the owner, or with his authorized agent, and thus failed to obtain the property. *Id.*

6. **POWER OF ATTORNEY — CONVEYANCE BY AGENT.** — Where an attorney in fact executes a deed in the name of his principal, and the grantee therein, on the same day, by another deed, conveys the same land back to the attorney in fact, both deeds are *prima facie* fraudulent and void upon their face, and the principal is not bound by them, but may repudiate the conveyances, and recover the land in an action of ejectment. *McKay v. Williams*, 597.
7. **REMEDY — FRAUD OF AGENT OR TRUSTEE.** — Where the misfeasance or fraud of an agent or trustee appears upon the face of his conveyances, the remedy may be administered in a court of law as well as in a court of equity. *Id.*
8. **CONVEYANCE — PURCHASER FROM ATTORNEY IN FACT.** — Where an attorney in fact conveys land by deed in the name of his principal, and the grantee therein, on the same day, deeds the land back to such attorney, both deeds are *prima facie* void, and the purchaser from the attorney is not a purchaser in good faith, but is bound by what appears in the chain of title through which he claims, but is chargeable with notice of the fraud which appears upon the face of the deeds. *Id.*
9. **AGENT WHO RECOVERS JUDGMENT IN HIS OWN NAME HOLDS LEGAL TITLE** thereto, and has power to sell and transfer it for the benefit of his principal; and a purchaser in good faith, to whom he assigns it, becomes the legal and equitable owner thereof, and the principal's interest therein ceases and determines; and the rights of such assignee will not be affected by payment to such principal after the making of the assignment. *Seymour v. Smith*, 683.
10. **AGENT WHO CONTRACTS IN HIS OWN NAME, AND FAILS TO DISCLOSE HIS PRINCIPAL'S NAME** at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract. The purchaser may, in such case, rely upon the responsibility of the person with whom he deals for the performance of the contract, and is not required to look elsewhere to obtain it. *Argersinger v. Macnaughton*, 687.

See EXECUTION, 1; FACTORS, 1, 2; INSURANCE, 2-4, 27; TROVER, 1-3.

ALTERATION OF INSTRUMENTS.

NEGOTIABLE INSTRUMENTS, 1.

ANIMALS.

1. **CARE IN SECURING A HORSE AND PREVENTING HIS ESCAPE WHICH HIS OWNER IS BOUND TO OBSERVE** is that care which every prudent man would exercise in dealing with similar horses at a like place and under like circumstances. Though a horse be sensible, gentle, and accustomed to stand at his owner's door in a busy, noisy street, yet if he be fancy, stylish, restless, and high-strung, the jury may infer negligence from leaving him loose elsewhere in the same or in another street, unattended, except by the owner watching him from a distance of five or six feet. *Phillips v. Dewald*, 458.
2. **EVERY HORSE MUST BE PROPERLY SECURED OR ATTENDED IN A CROWDED BUSINESS STREET** of a city, when there by the act of his owner, and subject to his control, no matter how gentle or amiable such horse may be. *Id.*

2. THE FACT THAT A LOOSE HORSE WAS FRIGHTENED BY THE EFFORTS OF PERSONS TRYING TO STOP or capture him, and was thereby caused to run away, will not relieve from liability his owner, who was guilty of negligence in leaving him unfastened and unguarded in the public streets. *Id.*

APPEAL AND ERROR.

1. REFUSAL TO GIVE CHARGE WHICH IS INCOMPLETE, AND, AS IT STANDS, MEANINGLESS, is not error. *Hagen v. Hackmeister*, 601.
 2. OBJECTION NOT MADE AT TRIAL, nor included in any assignment of error, cannot be urged for the first time in the appellate court. *Slater v. Chapman*, 593.
 3. EXCEPTION WHICH DOES NOT POINT OUT WHEREIN COURT IS CONCEIVED TO HAVE ERRED in its refusal to charge as requested, and thus give an opportunity for correction, is unavailing. *Toussay v. Roberts*, 656.
 4. ERROR WITHOUT PREJUDICE. — Where a complaint contains irrelevant and redundant averments, they should be stricken out on motion, but the refusal to strike them out is not reversible error, unless it affirmatively appears that prejudice results thereby to defendant. *Columbus etc. Ry Co. v. Bridges*, 58.
 5. TO SUBMIT TO JURY, AS QUESTION IN DISPUTE, MATERIAL FACT PROVED by uncontradicted testimony in the case is error. *Jenks v. Cohesil*, 502.
 6. LAW OF CASE. — Where a ruling is made in a case by the appellate court, it becomes the law of that case, and cannot be reviewed at a subsequent term. *Doyle v. Wade*, 334.
 7. SURETIES IN UNDERTAKING ON APPEAL ARE CONCLUDED BY THEIR AGREEMENT TO PAY from bringing in question, in an action against them upon their undertaking, any issuable fact that was necessarily determined by the judgment which they have agreed to pay. *Seymour v. Smith*, 683.
 2. Section 21, page 734, McClellan's Digest of Florida Statutes, providing the time within which a new action may be commenced, when judgment for plaintiff has been reversed for error, or when verdict and judgment for plaintiff has been arrested, has no application where the plaintiffs in the suits are not the same, or where the plaintiff in the first suit discontinued his action. *Doyle v. Wade*, 334.
- See DAMAGES, 2, 6; EJECTMENT, 3; ELECTION, 17; EVIDENCE, 24, 30; INSTRUCTIONS, 4, 5; MALICIOUS PROSECUTION, 14; RAILROAD COMPANIES, 9; TRIAL, 8.

ASSAULT.

See CRIMINAL LAW, 14-21.

ASSIGNMENTS.

See INSURANCE, 19; JUDGMENTS, 9.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The assignee of an insolvent debtor, in the absence of fraud in fact and of statute regulations, takes only the debtor's rights; and consequently he is affected with claims, liens, and equities enforceable as against the debtor. *Brown v. Brabb*, 549.
2. AN ASSIGNEE FOR THE BENEFIT OF CREDITORS is not a purchaser in good faith. The Michigan statute relative to common-law assignments does

not place the assignee upon any better footing than the creditors he represents. *Id.*

See CHATTEL MORTGAGES, 2.

ASSUMPSIT.

See BILL OF PARTICULARS, 1.

ATTACHMENT.

1. THE UNDIVIDED INTEREST OF AN HEIR in land under administration is subject to attachment, as such attachment does not dispossess the administrator, nor interrupt the administration. *McClellan v. Solomon*, 381.
2. FRAUDULENT CONVEYANCE. — An attachment may be levied on the undivided interest of a debtor in land held by a third party under a fraudulent conveyance from him; and the plaintiff, on obtaining judgment, may sell such interest, and his purchaser may raise the question of the fraudulent conveyance in an action of ejectment by him to recover his purchase from the party in possession. *Id.*

See JUDGMENTS, 18; MARRIED WOMEN, 5; SALES, 2.

ATTORNEY AND CLIENT.

See CRIMINAL LAW, 47; TRIAL, 6, 7.

BAILMENTS.

1. CONTRACT, WHETHER FOR SALE OR BAILMENT. — Contract between certain farmers and dairymen and one K., that they should furnish him milk, and that he should manufacture it into butter and cheese, sell the products, and after deducting four cents per pound for the butter and two cents per pound for the cheese, should divide the balance among them in proportion to the amount of milk furnished by each, constitutes him their factor merely, and does not vest in him the ownership of the cheese and butter manufactured. *First Nat. Bank of Eagle v. Schwenn*, 174.
2. CONFUSION OF GOODS. — If one unlawfully mixes and confuses his goods with those of another so that they cannot be distinguished, the innocent party becomes entitled to the whole. Hence if one who has contracted with others to manufacture into butter and cheese milk furnished by them mixes with the product of such milk butter and cheese purchased from others by him, he or his successor in interest has no title to any of the resulting mixture, unless he can identify that part which was his. *Id.*

BASTARDY.

1. A BASTARD COULD NOT INHERIT EVEN FROM ITS MOTHER by the common law, and this rule prevailed in the state of Illinois until, in the year 1829, a statute was enacted rendering illegitimates competent to inherit from their mother. *Orthwein v. Thomas*, 159.
2. EVERY CHILD IS PRESUMED TO HAVE BEEN BORN IN LAWFUL WEDLOCK; and this presumption must prevail until overcome by clear and convincing proof. *Id.*
3. PRESUMPTION THAT A CHILD WAS BORN IN LAWFUL WEDLOCK, and is legitimate, is not overcome by mere rumor, nor by the absence of positive proof of the actual marriage of its parents, nor by evidence of the sons of a brother of the child's mother that they had heard their father say that such mother had no husband, and that her child was illegitimate.

And where the question was as to the legitimacy of Susannah, wife of Thomas O., and daughter of Hannah, it was held that a deed made after the death of Hannah by her parents, James and Fanny H., to Susannah and her husband, Thomas, reciting the death of Hannah, the wife of William R., and that the grantors were Hannah's parents, and were her heirs at law, and that for the purpose of vesting the said Susannah and her husband with all the lands of which said Hannah was possessed in her lifetime, the grantors granted to said Thomas and Susannah all the lands which descended to the grantors on the death of their said daughter Hannah R., did not remove the presumption of Susannah's legitimacy, though if she were legitimate, she, and not the grantors in said deed, was the heir at law of said Hannah. *Id.*

BETTERMENTS.

See HUSBAND AND WIFE, 2.

BILL OF PARTICULARS.

1. **ASSUMPT** — **BILL OF PARTICULARS** — **EVIDENCE OF VOID CONTRACT**. — Where plaintiff declares in *assumpsit*, and afterwards files a bill of particulars praying the recovery of money paid on land contracts without consideration, alleging that defendant had no title to convey, he may prove such contracts void for want of due execution under the statute of frauds, when the defendant does not claim that such evidence would be a surprise to him, or that he is unprepared to meet it. *Wright v. Dickinson*, 602.
2. **BILL OF PARTICULARS** is considered in some respects as an amplification of the declaration, but it is sufficient if it fairly apprize the opposite party of the nature of the claim, so that there can be no surprise. *Id.*

BOARD OF TRADE.

See COMMERCE, 1, 2.

BONA FIDE PURCHASER.

See AGENCY, 9; EXERCUTIONS, 2; JUDGMENTS, 22; LES FENDERS, 5; NEGOTIABLE INSTRUMENTS, 4; SALES, 3; VENDOR AND VENDEE, 14.

BONDS.

See OFFICE AND OFFICERS, 1, 2.

BOOM COMPANIES.

See DEFINITIONS, 1; EQUITY, 3; STATUTES, 5.

BOUNDARIES.

1. **PAROL AGREEMENT** — **BURDEN OF PROOF**. — Where tenants in common by exchange of deeds divide their land, but leave the description of the boundary line confused and ambiguous, and the grantee of one of the tenants, as plaintiff in ejectment, claims up to boundaries fixed by a construction of the deeds by the court, while the defendant, the grantee of the other tenant, claims up to a different boundary line as fixed by a parol agreement between the tenants, the burden of proof is on defendant to show the existence of such agreement, and that the boundary

fixed by it had been accepted and acquiesced in by the tenants. This may be shown by the acts of the tenants while they were the owners of the land, by showing improvements made thereon by defendant's grantor, and statements by plaintiff's grantor made subsequent to such agreement, while he was owner, against his title. *Jones v. Pashby*, 589.

2. **ACQUIESCENCE — LIMITATIONS.** — Where parties, by mutual agreement and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established between them, such line will be considered the true line between them, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession. *Id.*
3. **PAROL AGREEMENT — ESTOPPEL.** — Where the boundary line fixed by tenants in common by exchange of deeds is so confused and ambiguous as to require the construction of a court, they may meet, and by parol agreement fix the boundary, and such agreement, if acquiesced in for years, will operate as an estoppel, the enforcement of which will not be prevented by the statute of frauds. *Id.*

BRIDGES.

See RAILROAD COMPANIES, 90.

CARRIERS.

1. **A RAILWAY COMPANY HAS NO RIGHT TO EJECT A PASSENGER FROM ITS CARS BECAUSE HIS TICKET IS NOT STAMPED** and his signature properly attested, where the omission to so stamp and attest is due to the failure of its ticket or other agents to comply with its own regulations. A company cannot urge the error of its agent as an excuse for disregarding its own ticket, nor as a ground for relief from damages, whether general or punitive, for ejecting a passenger from its cars. *Head v. Georgia etc. Ry Co.*, 434.
2. **RAILROAD COMPANY CANNOT UNREASONABLY OR UNJUSTLY DISCRIMINATE** between its customers in its charges for carrying freight, where the conditions are equal. What will amount to unjust discrimination is a question of fact, ordinarily to be determined upon consideration of all the facts and circumstances of the case. *Root v. Long Island R. R. Co.*, 643.
3. **CONTRACT BY RAILROAD COMPANY TO CARRY COAL FOR PARTICULAR PERSON AT REBATE** of fifteen cents per ton from the regular tariff rates, in consideration of his expending a large sum of money in building on the company's lands, and in part for its use and convenience, a dock and pocket for storing coal, and of his undertaking to ship coal in large quantities, and to load it upon the cars, cannot be declared void as against public policy, in the absence of any finding as a matter of fact that there was an unjust discrimination. In such a case, it cannot be determined as a matter of law that the discrimination was unjust. *Id.*
4. **LIABILITY OF CARRIER FOR BREACH OF CONTRACT.** — Where a railroad company undertakes to forward goods by rail, in accordance with the shipper's instructions, but, in disregard of such instructions, forwards them by steamer, and the goods are lost by fire on the steamer, the carrier is liable for the loss in an action on the contract. In such case, the principle of proximate cause is immaterial, and cannot be invoked. *Philadelphia etc. R. R. Co. v. Beck*, 924.

5. **CARRIER'S STIPULATION FOR LIEN SUBORDINATE TO RIGHT OF STOPPAGE IN TRANSITU.** — A stipulation in a bill of lading, which the vendor and shipper of goods takes from the carrier, that "the several carriers shall have a lien upon the goods (shipped) for all arrearages of freight and charges due by the same owners or consignees on other goods," if binding at all, is entirely subordinate to the consignor's right of stoppage *in transitu*, and is ineffectual to give the carrier a lien such as stipulated for, which will take precedence of such right. *Farrell v. Richmond etc. R. R. Co.*, 760.
6. **CONSTRUCTIVE DELIVERY OF GOODS.** — There being no actual delivery of goods by a carrier to the consignee, a constructive delivery can only be effected by an agreement on the part of the carrier, either express or implied, to hold the goods for the consignee, not as carrier, but as his agent. *Id.*
7. **LIABILITY OF CARRIER FOR LOSS OF FREIGHT BY UNAVOIDABLE DELAY.** — An extraordinary and unprecedented flood causing a delay in transportation and loss of perishable freight is such act of God as will excuse the carrier from liability for the loss, provided he has been guilty of no negligence nor departure from duty contributing to the occurrence of such loss. *Norris v. Savannah etc. R'y Co.*, 355.
8. **LIABILITY OF CARRIER FOR FAILURE TO GIVE NOTICE OF DELAY IN DELIVERY OF FREIGHT.** — Where the delivery of perishable freight is delayed by an unprecedented flood, constituting an act of God, a mere failure to notify the consignor or consignee of the detention is not, of itself, negligence rendering the carrier liable for the consequences of such delay, especially in the absence of proof that if notice had been given the loss would have been lessened, or to what extent. *Id.*
9. **COMMON CARRIER TAKING PROPERTY FROM PERSON NOT AUTHORIZED TO DIRECT ITS SHIPMENT** has no lien thereon for his services, and no right to retain the property. *Pingree v. Detroit etc. R. R. Co.*, 479.
10. **SEIZURE BY SHERIFF UNDER REGULAR PROCESS OF PROPERTY IN HANDS OF COMMON CARRIER** for shipment relieves him from liability for its non-delivery to the consignee. *Id.*
11. **COMMON CARRIER IS NOT COMPELLED TO ASSUME THAT REGULAR PROCESS IS ILLEGAL**, and to risk all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority. *Id.*

See DAMAGES, 1.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE IS VIOLATED BY AGREEMENT THAT MORTGAGOR MAY SELL** the property mortgaged, and apply the proceeds to other purposes than the mortgage debt, and not by the fact that such sale has been made. *Hangen v. Hachemeister*, 691.
2. **CHATTEL MORTGAGE IS VOID AS TO CREDITORS OF MORTGAGOR**, where there is an agreement or understanding between the parties thereto, at the time of its execution, that the mortgagor may sell or dispose of the property mortgaged for and on his own account. And such agreement or understanding may be proved by parol, or inferred from the fact that the sales are permitted by the mortgagees. *Id.*
3. **ASSIGNMENT FOR BENEFIT OF CREDITORS.** — **UNRECORDED CHATTEL MORTGAGE** made *bona fide* between the parties is valid as against the assignee

for the benefit of creditors of the mortgagor, when they became creditors before the date of such mortgage, and have not been led to do or not to do anything upon the strength of non-compliance with the statute regarding the recording of such mortgages. *Brown v. Brabb*, 549.

4. **RECORDING.** — The statutory provision for recording chattel mortgages is designed to take the place of delivery of the property; the object being to protect persons dealing upon credit with one who is in possession of personal property as the ostensible owner upon the faith of such ownership, from secret conveyances, by which he can obtain fictitious credit to which he would not be entitled if the true situation were known; but until such secret conveyance is given, the law has no force, and therefore does not operate upon a creditor who became such before the conveyance was executed. *Id.*
5. **CHATTEL MORTGAGE GIVEN TO SECURE** the payment of a *bona fide* debt, and authorizing the mortgagor to retain possession and continue the sale of the goods exclusively for the benefit of the mortgagee, paying the proceeds of sales to him each week, or oftener if required, is not fraudulent on its face, but is valid as against creditors, and makes the mortgagor the agent of the mortgagee to sell and account to him. *Murray, Dibrell, & Co. v. McNealy*, 33.

COMMERCE.

1. **MARKET QUOTATIONS AND REPORTS OF THE BOARD OF TRADE BECOME AFFECTED WITH A PUBLIC INTEREST**, if they, for many years, have been gathered and disseminated by telegraph companies and sent to all who would pay therefor, and if a great system for the instantaneous and continuous indication of the market has thus been established, and all dealers have conformed to the system and adopted its methods. *Stock Exchange v. Board of Trade*, 107.
2. **THE BOARD OF TRADE OF CHICAGO HAS NO RIGHT TO CREATE A MONOPOLY IN ITS MARKET QUOTATIONS AND REPORTS.** As long as it continues, directly or indirectly, the business of collecting and furnishing to the public such reports and quotations, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms; and it has no right to withdraw from one person instruments or facilities which it grants to others. *Id.*

CONCEALED WEAPONS.

See **CRIMINAL LAW**, 22-26.

CONFLICT OF LAWS.

See **LIMITATIONS**, 3; **MARRIED WOMEN**, 6.

CONFUSION OF GOODS.

BAILMENTS, 2.

CONSPIRACY.

See **CONTRACTS**, 3-5; **CRIMINAL LAW**, 15, 31.

CONSTITUTIONAL LAW.

1. **ACT REGULATING PRACTICE OF MEDICINE.** — The California act of April 1, 1878, requiring that every person practicing medicine or surgery shall

possess certain qualifications, and shall have issued to him a certificate from a board of examiners, appointed by a medical society, which may be revoked for unprofessional conduct, is not unconstitutional as a whole. *Ex parte McNulty*, 257.

2. **POWER OF LEGISLATURE TO ENACT LAW PUNISHING PHYSICIAN FOR "UNPROFESSIONAL CONDUCT."**—It is not within the police power of the legislature to enact a law punishing a physician who has been decided to be competent to practice, and to whom a certificate has been issued, for what is styled "unprofessional conduct," in advertising himself as a specialist in certain diseases. *Id.*
3. **POWER OF LEGISLATURE TO DELEGATE AUTHORITY TO BOARD OF MEDICAL EXAMINERS TO DECLARE WHAT ACTS SHALL CONSTITUTE CRIMINAL OFFENSE—RULES AND REGULATIONS.**—Legislature cannot delegate to a board of medical examiners the power to declare what acts shall constitute a criminal offense; but even if it could delegate to the board the power of declaring by rules and regulations what unprofessional conduct of a physician should constitute a crime, no one can be convicted of such crime, in the absence of rules and regulations. *Id.*

See COMMERCE, 1, 2; INSURANCE, 34; STATUTES.

CONTEMPT.

1. **HABEAS CORPUS—OFFICER'S FAILURE TO PRODUCE BODY OF PRISONER—AFFIDAVIT—ORDER TO SHOW CAUSE.**—Officer's failure to produce the body of the prisoner, in obedience to a writ of *habeas corpus*, when he has the power to do so, is a contempt committed in the face of the court, and no affidavit of the facts or order to show cause is necessary to authorize the court to commit him. *Ex parte Starnes*, 251.
2. **TITLE OF PROCEEDING.**—Contempt, though a specific criminal offense, is prosecuted, as a matter of practice, in the cause or proceeding out of which it arose, and not as a separate proceeding with a title of its own. *Ex parte Ah Men*, 263.
3. **CONTEMPT COMMITTED OUT OF VIEW OF COURT—AFFIDAVIT OF FACTS.**—Affidavit of facts constituting contempt, committed out of view of the court, need not set forth the pendency of the cause or proceeding, or the provisions of the order or writ therein, which has been violated; but it is sufficient if the acts done in violation of the order or writ are set forth. *Id.*
4. **JUDICIAL NOTICE OF PROCEEDINGS IN ACTION PENDING.**—Judicial notice is taken by the court of the proceedings in an action pending before it on a prosecution for contempt for disobeying an order or writ issued therein. *Id.*
5. **INQUIRY ON HABEAS CORPUS.**—Inquiry on *habeas corpus* into the commitment of the prisoner for contempt is confined to the determination whether or not the court had jurisdiction. No irregularity in the proceedings taken to obtain jurisdiction, and no question of injustice or wrong that may have been done to the petitioner, can be considered. *Id.*
6. **CONCLUSIVENESS OF JUDGMENT ON COLLATERAL ATTACK.**—Judgment of a court having jurisdiction committing a person for contempt is final and conclusive, and cannot be collaterally attacked, however irregular the proceedings taken to obtain jurisdiction may have been. *Id.*

7. **DISOBEDIENCE OF PROCESS—FICTITIOUS NAMES OF PARTIES.**—It is sufficient if the court, on the hearing of contempt proceedings, ascertains the true name of the defendant therein, and so states it in the judgment, when the fact that the true names of the defendants in an action were unknown is alleged in the complaint, followed by a prayer that when discovered the complaint might be amended by alleging their true names, and an injunction follows the complaint, and is directed to the defendants by fictitious names, but is actually served on the defendants, and the affidavit for a warrant of attachment for contempt describes the defendants as persons who had been thus served. *Id.*
8. **ENFORCEMENT OF A DECREE FOR A SPECIFIC SUM OF MONEY CANNOT BE BY PROCESS OF CONTEMPT,** but only by execution against property as at law. It is therefore an error to add to a decree for the payment of money a clause that in default of payment, "the defendant be held and deemed to be in contempt of the order and decree of this court." *Clements v. Tillman*, 451.
9. **CIVIL CONTEMPTS** are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the advantage of another party to the proceeding. *Ex parte Robertson*, 207.
10. **CRIMINAL CONTEMPT IS AN ACT** in disrespect of the court or of its process, or which obstructs the administration of justice, or tends to bring the court into disrepute. *Id.*
11. **JUSTICE OF PEACE MAY,** under the Texas statute, fine an officer of the court for civil contempt in failing and refusing to execute its process, and may direct that such fine inure to the benefit of plaintiff in a sequestration proceeding, and in addition to such fine the court may order the officer committed to imprisonment until the fine is paid. *Id.*
12. **FINE—IMPRISONMENT FOR DEBT.**—Fine imposed for civil contempt is not a debt within the meaning of the Texas constitution declaring that "no person shall ever be imprisoned for debt." *Id.*
13. **JUDGMENT—COMMITMENT.**—Either the order or judgment finding a party guilty of civil contempt in disobeying the command of the court, and the order of commitment for such contempt, must recite that it was in defendant's power to perform the required act, or the commitment is void. *Id.*

See JUDGMENT, 13.

CONTRACTS.

1. **CONSTRUCTION OF—EQUITY JURISDICTION.**—An agreement entered into between two railroad companies provided as follows: "In the use or working of the railroads of the parties hereto at or near the point of crossing, all trains, engines, or cars of the party of the second part shall come to a full stop at a distance of at least two hundred feet from the point of crossing, and shall not proceed until the proper signal shall have been given by the watchman in charge. All engines and trains of the party of the first part shall have priority of passage over the trains and engines of the party of the second part; but no unnecessary detention shall be caused to the trains of either of the parties hereto, nor shall said crossing be blocked by either of the said parties." In a suit in equity brought by the company of the first part against the other company to enforce the agreement, it was held that the language employed was unambiguous, and made no distinction of trains and engines into classes; that priority of passage was given to all engines and trains of the

plaintiff over those of the defendant; that there was no warrant to go outside of the agreement to ascertain by parol testimony the rules of priority of different classes of trains, and apply them to the agreement; and that jurisdiction in equity to enforce such agreements was undoubted. *Appeal of Cornwall etc. R. R. Co.*, 889.

2. WHERE WRITTEN AGREEMENT IS SILENT ON SUBJECT, and in absence of fraud or mistake, parol testimony is admissible to show a contemporaneous parol agreement as to the time during which the written agreement was intended by the parties to continue in force; and the testimony of a single witness, as, for instance, the person who drew the contract, is sufficient to establish such parol agreement, in the absence of testimony to the contrary. *Real Estate etc. Co.'s Appeal*, 920.
 3. ACTION TO ADJUST DIFFERENCES OF PARTIES WHO HAVE ENGAGED IN UNLAWFUL PLOT to advance the price of an article of food will not be entertained by the courts. *Leonard v. Poole*, 667.
 4. PERSONS KNOWINGLY PROMOTING AND PARTICIPATING IN CARRYING OUT CRIMINAL SCHEME ARE ALL PRINCIPALS, and the fact that one of them acts, in some respects, in subordination to the others, and is to profit less than the others, or not at all, by the consummation of the scheme, does not render him less a principal. *Id.*
 5. LAW-BREAKERS ARE NOT ENTITLED TO AID OF COURTS to adjust differences arising out of and requiring an investigation of their illegal transactions. *Id.*
- See AGENCY, 4, 10; BAILMENTS, 1; BILL OF PARTICULARS, 1; CARRIERS, 4; EVIDENCE, 2, 3; FACTORS, 1, 2; FRAUD, 1; INSURANCE, 13; MARRIED WOMEN, 6; PARTNERSHIP, 2; TAXATION, 4; VENDOR AND VENDEE, 9.

CO-TENANCY.

CO-TENANT HAS NO EQUITY TO PROVE AGAINST FUND RAISED BY SALE OF LAND, UNDER PROCEEDINGS IN PARTITION, claims for taxes and municipal assessments against the land paid by him during his exclusive possession and enjoyment thereof, which had continued for many years, he all the while ignoring the title of his co-owners and excluding them from any participation in the management or control of the land. *Wistar's Appeal*, 917.

See BOUNDARIES, 3.

COURTS.

1. JURISDICTION OF PROBATE COURT to order the sale of lands of a decedent is statutory and limited, and must appear from the record. No intentions will be made in its favor, but such jurisdiction attaches when a petition is filed by the proper party, setting forth any of the statutory grounds for a sale; and jurisdiction having once attached, any intervening errors or irregularities in the proceedings will not avail to avoid the sale when collaterally impeached. *Goodwin v. Sims*, 21.
2. PROBATE COURT — NOTICE TO NON-RESIDENT. — Recital in the record of a probate court that a party, being a non-resident, was notified of an application for the sale of land of a decedent, and of the day set for the hearing, by publication as required, is conclusive on collateral attack, when not negatived or falsified by the record itself. *Id.*

CRIMINAL LAW.

1. CONVICTION OF ONE CRIME AS BAR TO PROSECUTION FOR ANOTHER. — A conviction for conveying into a county jail a file, with intent to facili-

tate the escape of a prisoner charged with misdemeanor, is a bar to conviction for the same act of conveying the same file into the same jail, with intent to liberate a prisoner confined therein on a charge of felony. In such case the state may elect to prosecute for the higher grade of crime, — the attempt to liberate the felon. *Hurst v. State*, 79.

2. **EVIDENCE TENDING TO CRIMINATE.** — Prisoner need not give nor exhibit evidence which tends to criminate him; and his refusal to do so cannot be taken as a circumstance against him. Thus the prisoner's refusal to make foot-prints, under a promise of release if the tracks, when made, did not exactly correspond with those of the suspected party, cannot be used against him. *Cooper v. State*, 84.
3. **HABEAS CORPUS — SUFFICIENCY OF COMPLAINT OR INDICTMENT AND OF EVIDENCE — PUBLIC OFFENSE NOT COMMITTED.** — Sufficiency of a complaint or indictment, or of the evidence to support it, cannot, in general, be inquired into on *habeas corpus*; but when the facts charged and proved do not constitute a public offense, the defendant will be discharged on *habeas corpus*. *Ex parte McNulty*, 257.
4. **PRACTICING MEDICINE AFTER REVOCATION OF CERTIFICATE.** — Practicing medicine after revocation of the certificate issued by a board of medical examiners does not constitute a criminal offense, under the California act of April 1, 1878, regulating the practice of medicine. The act only makes it a crime to practice without first having procured a certificate. *Id.*
5. **CONSTRUCTIVE CRIMES.** — The question whether certain conduct is made a crime by statute must be determined from its language. Constructive crimes — crimes built up by courts with the aid of inference, implication, and strained interpretation — are repugnant to the spirit and letter of the English and American criminal law. *Id.*
6. **CORPUS DELICTI — EVIDENCE.** — To convict of crime, the *corpus delicti* and the identity of the accused with the criminal act must be established. This may be done by circumstantial as well as by direct evidence, if satisfactory to the understanding and conscience of the jury beyond a reasonable doubt. *Willard v. State*, 197.
7. **CORPUS DELICTI.** — CONFESSION alone will not sustain conviction of crime in the absence of corroborative proof of the *corpus delicti*. *Id.*
8. **CORPUS DELICTI — CONFESSION — INSTRUCTIONS.** — While it is true that the *corpus delicti* consists, not only in the crime, but also in defendant's connection therewith, and that a confession alone will not sustain a conviction, but the *corpus delicti* in both respects mentioned must be shown by other proof, still, in a proper case, the jury may be charged, when the evidence sustains it, that to establish the *corpus delicti* they may consider defendant's statements in connection with the other proof. *Id.*
9. **ADULTERY**, under the Texas statute (Penal Code, articles 333-337), may be committed in two ways: 1. By the parties living together and having carnal intercourse with each other; 2. By the parties having habitual carnal intercourse with each other without living together. To convict under the first way, it must be proved that the parties lived, dwelt, and resided together, and a single act of carnal intercourse is sufficient, if they so live. To convict under the second way, the proof must show that the carnal intercourse was habitual. *Bird v. State*, 214.

10. **ADULTERY.** — "LIVING TOGETHER," as used in articles 333-337 of the Texas Penal Code defining adultery, means that the parties must reside together; that is, dwell and abide together in the same habitation as a common or joint residing-place. *Id.*
11. **ADULTERY.** — To constitute "living in adultery," under section 4012, Alabama Criminal Code, a single or occasional adulterous act, without more, is not sufficient. There must be a continuation, or agreement for continuation, coupled with one or more acts; but when such acts and circumstances are proved, the jury may determine whether there was such continuation as amounts to living together, or a mutual guilty consent, express or implied, for such continuation. The parties need not occupy the same dwelling to constitute the crime, if such guilty consent is found. *Bodiford v. State*, 20.
12. **ADULTERY.** — Conviction for adultery is proper upon proof showing adulterous intercourse between the parties not less than four different times within the period of a month, with a confession by defendant that he had indulged in such illicit intercourse whenever he desired; and the jury may determine whether there existed in the minds of the parties a purpose to continue the adulterous intercourse, so as to constitute "living together in adultery," within the meaning of section 4012, Criminal Code of Alabama. *Smith v. State*, 17.
13. **CONVICTION FOR ADULTERY.** — The instructions asked and refused were as follows: "1. The jury are not authorized to infer that the parties lived together in a state of adultery or fornication from the mere fact that they had sexual intercourse as many as four times within the same month; nor are they authorized to infer, from these facts alone, an intention on their part to continue these acts; there must be evidence to show a living together in adultery. 2. The fact that defendant and said female lived in the same house for about a month, and had sexual intercourse four times, two of which were in the house and the other two at other places, is not, of itself, sufficient to show the state or condition existing between the parties, but there must be other evidence to show the state or condition denounced by the statute." *Id.*
14. **CONVICTION OF ASSAULT WITH DEADLY WEAPON IS NOT BAR TO PROSECUTION FOR ATTEMPT TO COMMIT ROBBERY.** — Conviction of an assault with a deadly weapon, under an information charging an assault with intent to commit murder, is not a bar to a subsequent prosecution for an attempt to commit robbery, although both offenses relate to the same transaction, and are so closely connected in point of time that it is impossible to separate the evidence relating to them. *People v. Bentley*, 225.
15. **EVIDENCE TO SHOW CONSPIRACY.** — Evidence of the acts and declarations of an alleged co-conspirator before the commission of the crime, and tending to show the probability of an understanding between him and the defendant, is admissible to prove the conspiracy, in a prosecution for an attempt to commit robbery. *Id.*
16. **WITNESS — IMPRACHMENT OF DEFENDANT BY EVIDENCE OF HIS GENERAL REPUTATION.** — Defendant in a criminal case who has been a witness in his own behalf may be impeached by evidence as to his general reputation. *Id.*
17. **ASSAULT — DEFINITION.** — To constitute an assault, there must be an intentional attempt to do injury to the person of another by violence, and

such attempt must be coupled with the present ability to do the injury attempted. *State v. Godfrey*, 830.

18. **ASSAULT.** — To POINT EMPTY GUN AT ANOTHER, at a distance from thirty to seventy yards, whereby such other is put in fear, and flees, is not an assault with a dangerous weapon. *Id.*
19. **ASSAULT — DANGEROUS WEAPON.** — A dangerous weapon is one capable of producing death or great bodily harm. An unloaded gun in the hands of the defendant, at a distance of four or five rods from the party alleged to have been assaulted, is not a dangerous weapon. *Id.*
20. **ASSAULT — LETHAL WEAPONS.** — Guns, swords, knives, pistols, and the like are clearly lethal weapons, as matter of law, when used within striking distance from the person assaulted; all others are lethal or not, according to their capability to produce death or great bodily harm in the manner in which they are used, and of this the jury must always be the judges. In the particular case under consideration, the gun was a lethal weapon, if it was loaded; otherwise it was harmless. *Id.*
21. **ASSAULT — INTENT.** — No intent is necessary to constitute crime of being armed with a dangerous weapon, and assaulting another therewith, other than such as may be embraced in the act of making an assault with a dangerous weapon. A specific intent to inflict death or great bodily harm is unnecessary. *Id.*
22. **CARRYING PISTOL — "PERSON TRAVELING."** — A party making a journey of fifty miles in a wagon with his family is a "person traveling," within the meaning of the Texas statute, so as not to violate the law by carrying a pistol upon his person during such time, and he may so carry it at a wagon-yard where he makes a temporary stop, or in a town during a temporary cessation in his journey for legitimate purposes, as to procure a conveyance, purchase provisions, or transact other business legitimately connected with his journey; but such statute will not protect him from arrest while on the journey and in a town, but sitting at a table in a gambling-house with others, with the pistol on his person, and not engaged in any business connected with the journey. *Stilly v. State*, 201.
23. **CARRYING PISTOL — "PERSON TRAVELING" — EVIDENCE.** — A party making a journey, but temporarily stopping in a town, and seated at a gambling-table with others, with a pistol on his person, is *prima facie* guilty of a violation of the Texas statute against carrying arms, except as to "persons traveling," and it devolves upon him to establish the facts or circumstances upon which he relies to excuse or justify the prohibited act. *Id.*
24. **CARRYING PISTOL — "PERSON TRAVELING."** — Whether a person carrying a pistol is a "person traveling," within the meaning of the Texas statute, so as to exempt him from prosecution, is a question of fact for the jury. *Shelton v. State*, 200.
25. **CARRYING PISTOL — PERSON TRAVELING.** — A person carrying a pistol, and fleeing from officers to evade arrest, is not a "person traveling," within the meaning of the Texas statute, so as to exempt him from prosecution. *Id.*
26. **VENUE.** — To convict of crime, the venue must be proved as alleged. *Id.*
27. **FORGERY — INDICTMENT.** — Where the writing declared a forgery is so incomplete as not to disclose on its face a legal liability, then, to make it the technical subject of forgery, the indictment must aver such extrinsic facts as will invest the instrument with legal force, and show

that, if genuine, it would form the basis of a legal liability. *King v. State*, 203.

23. **FORGERY — EVIDENCE.** — On a trial on information for forgery of a deed, the testimony of a register of deeds that a careful examination of his records failed to show any transfer of particular land by a grantee in a deed introduced in evidence, save by the alleged forged deed, is admissible to show title to the land in such grantee at the time of the alleged forgery. *People v. Parker*, 578.
29. **FORGERY — EVIDENCE.** — On trial of an indictment for forging the name of a deceased person to a deed, the files of the probate court of the estate, including the will of such deceased person, are inadmissible as evidence for the purpose of allowing comparison between the signature to the will and that to the deed. *Id.*
30. **FORGERY — EVIDENCE.** — On the trial of an information for the forgery of a deed, the evidence of witnesses testifying to the genuineness of the signature to such deed by comparison with a genuine signature affixed to a document not legally in evidence for some other purpose than that of comparison is inadmissible. *Id.*
31. **CONSPIRACY — EVIDENCE.** — The theory that the acts and declarations of each conspirator in pursuance of the common purpose may be given in evidence against all only applies when such acts and declarations are confined to the time intervening between the beginning and ending of the conspiracy, and said or done in the presence of the other conspirators with their knowledge and ratification. Before such acts or declarations can be admitted in any event, a *prima facie* case of conspiracy must appear to the trial court, so that they may be submitted to the jury to be used if they find that a conspiracy existed, but discarded if it is not established. *Id.*
32. **FORGERY — EVIDENCE.** — Where one indicted for forgery of a deed testifies in his own behalf that the alleged forged deed is genuine, — that it was part of a double blank executed and detached on the same day that the grantor executed the other deed admitted to be genuine, and so given in evidence, — two witnesses testifying that upon a careful comparison of the deeds they matched exactly at the top, where they had been torn apart, the deed admitted to be genuine to be admitted in evidence, and the defense allowed to prove that it was genuine, and so treated by the grantor in her lifetime, and used upon a public trial before her death, and upon the production of such proof, comparison between the two signatures would be proper. *Id.*
33. **FORGERY — EVIDENCE.** — On a trial of an information for forgery, a recognition to appear and answer, and an affidavit for a continuance, are part of the record in the case, and may be used in making a comparison of handwriting. *Id.*
34. **FORGERY — EVIDENCE.** — On the trial of an indictment for forgery, a note and mortgage bearing the signature of the alleged forger, but not a part of the record in the case, or admitted in evidence for other purposes, are not admissible for the sole purpose of making a comparison of signatures. *Id.*
35. **FORGERY — EVIDENCE.** — The condition, whether drunk or sober, of an alleged forger when he made any signature or writing properly in the case, is admissible when such writing is used for a comparison of handwriting. *Id.*

36. LARCENY. — A servant employed on a farm, who has the care and custody of a mule belonging to his master, is guilty of larceny when he fraudulently converts the mule to his own use and sells it. *Crocheron v. State*, 18.
37. LARCENY. — TAKING PROPERTY UNDER A FAIR CLAIM OF RIGHT is not larceny, and the publicity of the taking is very powerful evidence of the good faith of the claim. *Causey v. State*, 447.
38. LARCENY. — Where, under a custom, a builder is entitled to the use and possession of the drawings of a building while it is in course of construction, he has a special property therein, which may be the subject of larceny by the architect who is the general owner, but who fraudulently and clandestinely takes them from the possession of the builder, with felonious intent to convert them to his own use, or deprive the builder of their possession. *Lunsford v. Dietrich*, 37.
39. TREMPASS — LARCENY. — One who, having the general ownership of personal property, wrongfully takes it from another who has the possession and a special property therein is a trespasser; but if he takes it openly, in the presence of the party having possession, or of other persons known to him, he is not guilty of larceny, but of mere civil tort. *Id.*
40. NEGLIGENCE HOMICIDE. — INDICTMENT for negligent homicide which defines the offense, alleges all its elements, sets forth specifically the acts and omissions of defendants, and alleges that such acts and omissions caused the death of deceased, is sufficient under article 579, Penal Code of Texas. *Anderson v. State*, 189.
41. NEGLIGENCE HOMICIDE — WITNESS. — A party charged, either in the same or another indictment, as a principal in negligent homicide, though he may be charged under a wrong name, is not a competent witness on behalf of the defense under article 731, Texas Code of Criminal Procedure. *Id.*
42. NEGLIGENCE HOMICIDE — BY OMISSION. — To constitute negligent homicide by omission, there must be a violation of some duty imposed by law, directly or impliedly, and with which duty defendant is especially charged. Such crime presupposes a duty to perform the act omitted, and cannot in law be imputed, except upon the predicate of duty. *Id.*
43. NEGLIGENCE HOMICIDE BY OMISSION. — Brakemen who are riding upon an engine, and whose exclusive duty it is to act as brakemen, who have no control over the engine, which is under the exclusive operation and control of the engineer and fireman, whose duty it is to look out for obstructions, and give signals of danger, are not guilty of negligent homicide for the killing of a child run over by the engine. *Id.*
44. CIRCUMSTANTIAL EVIDENCE considered and held to be sufficient to sustain conviction for murder. *Gannon v. People*, 147.
45. EVIDENCE THAT A MOTHER, UPON BEING INFORMED OF THE DROWNING OF A CHILD, EXCLAIMED IN THE PRESENCE OF HER HUSBAND, ALFRED: "I knew it, I knew it; my heart has ached for two hours, O Alfred"; and that he then caught her and told her "to hush, and not take on," — is admissible on the trial of the husband for the murder of such child. *Id.*
46. EVIDENCE — CONVERSATION BETWEEN HUSBAND AND WIFE OVERHEARD BY A THIRD PERSON may be given in evidence by him, though neither of them would have been permitted to disclose it. *Id.*

47. DENIAL OF INSTRUCTIONS CONCERNING THE SUPPOSED REMARKS OF COUNSEL, about which the record is silent, cannot be considered on appeal. *Id.*
48. JUDGMENT OF CONVICTION FOR MURDER WILL NOT BE REVERSED, because the court in its instructions to the jury defined the crimes of voluntary and involuntary manslaughter, when the evidence showed the defendant either to be innocent of any crime or to be guilty of murder. *Id.*
49. INSTRUCTION CONCERNING REASONABLE DOUBT is not erroneous because it limits such doubt to a reasonable doubt arising out of the evidence in the case. *Id.*
50. A REASONABLE DOUBT IS ONE ARISING FROM a candid and impartial investigation of all the evidence, such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause. *Id.*
51. TO WARRANT CONVICTION ON CIRCUMSTANTIAL EVIDENCE, it is not essential that no inference or presumption should be indulged in by the jury that did not in their minds necessarily arise from the circumstances proved. *Id.*
52. OMISSION OF THE COURT TO ASK DEFENDANT BEFORE JUDGMENT AND SENTENCE IF HE HAD ANYTHING TO SAY WHY sentence should not be pronounced against him will not warrant a reversal of such judgment. *Id.*
53. PLEA OF FORMER JEOPARDY MUST SHOW how and when the prisoner was put in jeopardy. *Id.*
54. FORMER JEOPARDY. — If a new trial is granted on the defendant's application, he may again be tried on the same or on an amended indictment. *Id.*
55. AMENDED INDICTMENT. — After a defendant has been tried and convicted, and a new trial has been granted at his request, a grand jury may find a new or amended indictment charging him with commission of the same crime, and he may be tried and convicted thereon before the first indictment has been actually discontinued or disposed of. *Id.*
56. MURDER — MANSLAUGHTER — THREATS. — The mere fact of being encountered or overtaken in the street or highway by one who has threatened another's life some months before, without any act indicative of an intention of then carrying such threats into execution, is not adequate cause to excite such anger, rage, sudden resentment, or terror as renders the mind incapable of cool reflection, so as to reduce a killing from murder to manslaughter; even if an agreement existed between the accused and deceased that the latter would not carry his rifle in his hands, or otherwise than attached to his saddle in a scabbard, or in his buggy, and that any other mode of carrying the gun might be considered a declaration of hostility, and it is shown that when the deceased was killed he was sitting on his horse, with the gun across his lap, in violation of his contract, but that he made no hostile demonstration with it, even after the attack was made on him. *McDade v. State*, 216.
57. INSTRUCTION — REASONABLE DOUBT. — An instruction that "defendant is presumed to be innocent until his guilt is established by the evidence, to the satisfaction of the jury, beyond a reasonable doubt," is a substantial compliance with the statute, though the word "legal" is omitted before the word "evidence." *Id.*

58. **EVIDENCE.** — Where a defendant elicits testimony from his witness on direct examination adverse to himself, he must abide the consequences, and cannot complain that it is given, with other evidence, to the jury for their consideration. *Id.*
59. **MOTION TO QUASH INFORMATION PROPERLY DENIED WHEN.** — Where the accused is charged in the complaint and warrant with manslaughter in the statutory form, and in the information with manslaughter by the administration of drugs and medicines, and by the use of an instrument, a motion to quash the information on the ground that the offenses charged therein are not those named in the complaint and warrant is properly denied. *People v. Aikin*, 512.
60. **JOINDER OF COUNTS IN CRIMINAL INFORMATION.** — Where the first count in an information for manslaughter charges that the defendant did feloniously and willfully kill and slay the deceased, a second count alleges the administration of medicine and drugs, a third the use of an instrument, and a fourth count charges the defendant with criminal neglect as a man-midwife, to whom the care of the deceased had been committed, resulting in her death, the crime charged in the fourth count is not contained within the offense charged in the first count as a lesser crime within a greater, nor does the fourth count come within the statute upon which the second and third counts are based, nor can it be considered as charging in any manner the crime of manslaughter by an attempt to produce an abortion, or by an abortion; and a general verdict of guilty under the second, third, and fourth counts cannot be sustained. *Id.*
61. **PROSECUTION SHOULD BE COMPELLED TO ELECT UPON WHAT THEORY IT ASKS CONVICTION** of the accused, where in one count of the information he is charged with producing an abortion upon the deceased, and in another with criminal neglect as a man-midwife, resulting in her death. *Id.*
62. **TRUE RULE AS TO JOINDER OF COUNTS IN INFORMATION** or indictment is, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legitimate one; but where the object, purpose, and effect is to prosecute the defendant for separate felonies by one information or indictment, the court will not permit it to be done, as the injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice. *Id.*
63. **CORPUS DELICTI IS TO BE ESTABLISHED, IN PROSECUTION FOR MANSLAUGHTER** by procuring an abortion, not only by the *post mortem*, but also by the fact of the pregnancy of the deceased, her illness, her treatment, and by whom, and her condition generally up to the time of her death; and after the physicians have given testimony tending to show that her death was produced by abortion, it is competent and proper to show the history of her illness from the very beginning to the end, including what was done and said by the accused in connection with her illness while in the house attending upon her. *Id.*
64. **HYPOTHESIS OF GUILT MUST BE COMPARED WITH FACTS PROVED**, and with all of them, in cases of purely circumstantial evidence, and if any of the facts or circumstances established be absolutely inconsistent with the hypothesis of guilt, that hypothesis cannot be true. *Id.*
65. **EACH NECESSARY LINK IN CHAIN OF EVIDENCE MUST BE PROVED BEYOND REASONABLE DOUBT** to sustain a verdict of guilty in a criminal case resting upon circumstantial evidence. *Id.*

66. TWO COUNTS MANIFESTLY RELATING TO SAME OFFENSE AND TRANSACTIONS ARE PROPERLY JOINED in the same information, where the one is varied from the other only to meet the evidence as it may be adduced. *Id.*
67. MORTGAGOR MAY BE GUILTY OF A FRAUDULENT DISPOSITION of the mortgaged property, and of occasioning loss to the mortgagee, under section 4600 of the code of Georgia, though he has other property from which the mortgagee could have collected the debt secured by his mortgage. The mortgagee is entitled to be satisfied out of the specific property, and the mortgagor has no right to throw his secured creditor on his general estate. *Coleman v. Allen*, 449.
68. THE REFUSAL OF THE MORTGAGOR TO PRODUCE OR POINT OUT THE MORTGAGED PROPERTY to an officer who is seeking to levy thereon to satisfy the mortgage is not a criminal offense, but it may be a strong circumstance to indicate fraud. *Id.*
69. PERJURY. — In order to convict of perjury committed in a judicial proceeding, it must be made to appear by the allegations of the indictment, and the evidence offered to support it, that the court had jurisdiction. *Wilson v. State*, 180.
70. PERJURY — COMPLAINT — INFORMATION. — A complaint charging the offense is a necessary part of and must be filed with every information under the Texas statute, and without it the information is invalid and worthless, and confers no jurisdiction on the court. Therefore, in order to sustain an information for perjury in a judicial proceeding, such information, together with the complaint upon which it is based, must be introduced in evidence. *Id.*
71. PERJURY — INSTRUCTION REGARDING EVIDENCE TO CONVICT FOR PERJURY. — In trials for perjury in Texas it is fatal error to fail to charge the jury in words or substance that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or one credible witness corroborated strongly by other evidence, as to the falsity of defendant's statement under oath, or upon his own confession in open court," as provided by article 746, Texas Code of Criminal Procedure; article 677 thereof providing that it is imperative in felony cases that the charge "shall distinctly set forth the law applicable to the case, whether asked or not." *Id.*
72. ROBBERY — EVIDENCE. — Where an indictment for robbery unnecessarily describes the money taken as "lawful money of the United States of America," such description must be proved, and an absence of such proof is ground for a new trial. *Coffelt v. State*, 205.
73. ROBBERY — VARIANCE. — Where an indictment for robbery alleges that the money was taken from the person of the party robbed, and the proof shows that the accused presented a pistol at the party robbed, and afterwards struck him, and he, in fear of his life, or of serious bodily harm, delivered his money, this is a sufficient taking to support the indictment, under article 723, Penal Code of Texas. *Id.*
74. JOINT VERDICT AGAINST JOINT OFFENDERS must assess a separate penalty against each, to be valid. *Medis v. State*, 192.
75. SODOMY — ACCOMPLICE. — Where in sodomy the prosecuting witness consents to the act, he is an accomplice whose testimony must be corroborated; and where the evidence is such as to leave the question of consent in doubt, the jury must be instructed that if they find that he consented they must then find that he was corroborated, in order to convict. *Id.*

- 76. DEFINITION.** — The word "seduction," in its application to the conduct of a man toward a woman, means the use of some influence, promise, arts, or means on his part, by which he induces the woman to surrender her chastity and virtue to his embraces. A woman cannot be said to be "seduced," who, at the time of the alleged seduction, was leading a lewd and lascivious life. *Patterson v. Hayden*, 822.
- 77. AFTER REFORMATION.** — A woman may be guilty of unchastity, and then reform and lead a virtuous life, and if then seduced, her seduction ought to be visited with such damages as a jury would think, in view of all the facts and circumstances, the defendant ought to pay; but to justify a recovery there must be a reformation. *Id.*
- See CONTEMPT**, 10; **CONTRACTS**, 3-5; **INSTRUCTIONS**, 2; **JURISDICTION**, 3-5; **HIGHWAYS**, 6-13; **TRIAL**, 10.

CROPS.

See EJECTMENT, 2.

CROSS-BILLS.

See DEEDS, 8; **PLEADINGS**, 2, 3.

CORPORATIONS.

See SCHOOLS, 1, 2.

CURTESY.

See LIMITATION OF ACTIONS, 1.

CUSTOM AND USAGE.

See DEFINITIONS, 2; **EVIDENCE**, 2, 3.

DAMAGES.

- 1. CARRIER — PUNITIVE DAMAGES.** — CARRIER IS ANSWERABLE FOR GENERAL OR PUNITIVE DAMAGES for wrongfully ejecting a passenger from its cars; and it is an error for the court to sustain a demurrer to that part of the complaint which sets up general and punitive damages. *Head v. Georgia Pac. R'y Co.*, 434.
- 2. WOUNDING A MAN'S FEELINGS** is as much actual damages as breaking his limbs, though the jury has a much wider discretion in dealing with feelings than with external injuries. *Id.*
- 3. EXTENT OF RECOVERY IN ACTION FOR NEGLIGENT KILLING OF CHILD.** — In an action against a railroad company for the negligent killing of a child of eleven years of age, the recovery of the parents should be limited to compensation for the loss of the services of the child during her minority, and an instruction to the jury that they might further take into consideration such other pecuniary benefits as the parents might reasonably be expected to realize had she lived for the balance of her probable duration of life, not exceeding theirs, is unsatisfactory, as permitting the jury to speculate upon contingencies too remote and uncertain. But if the verdict returned is no greater than the jury might have found had the objectionable part of the charge not been given, it will not be disturbed, no error prejudicial to the defendant appearing. *Cooper v. Lake Shore etc. R'y Co.*, 482.

4. **RULE ALLOWING DAMAGES TO BE BASED ON CONTRIBUTIONS TO PARENTS NOT APPLICABLE IN CASE OF VERY YOUNG CHILD.** — In an action to recover for the death of a child, where the parents are the persons entitled to damages, the rule that their damages may be estimated upon the customary contributions of the deceased, proven before the jury, is not applicable in the case of a very young child who has never made any contributions, and when it is impossible to show that she ever will make any. *Id.*
5. **IF DAMAGES UP TO TIME OF TRIAL ARE RECOVERED** by the plaintiff, under the instructions of the court, in a case where he is entitled to recover only such as had accrued at the time of the commencement of the action, but no objection was made on that ground in the court below, the question cannot be presented on appeal. But such recovery may be a bar to any future claim for damages sustained by him prior to the time of the trial. *Husser v. Brooklyn City R. R. Co.*, 679.
6. **WHERE PLAINTIFF WAIVES RIGHT TO RECOVER NOMINAL DAMAGES FOR TRESPASS** upon the street in front of his premises, and asks to recover only substantial damages for injury to his premises from the maintenance of a nuisance in the street in front thereof, and the court in charging the jury makes the right of recovery to depend upon the finding of the jury that there had been a substantial injury to the plaintiff's use of his premises resulting from the acts of the defendant, the question of the plaintiff's title to the street is thereby taken out of the case, and the refusal of the court to charge that the plaintiff had no right in fee to the street, and that the defendant had not trespassed upon the plaintiff's property, is not error. *Id.*
- See **AGENCY**, 5; **CARRIERS**, 1; **CRIMINAL LAW**, 77; **EMINENT DOMAIN**, 1, 2; **EVIDENCE**, 1; **HIGHWAYS**, 5; **MALICIOUS PROSECUTION**, 11, 17; **MASTER AND SERVANT**, 9-16, 19; **RAILWAY CORPORATIONS**, 8, 15; **SALE**, 7.

DEEDS.

1. **PAROL EVIDENCE TO VARY.** — **ABSOLUTE DEED TO REAL PROPERTY CONVEYS FROM GRANTOR TO GRANTEE** all the title of the former, and he will not be allowed to prove by parol evidence that it was made in trust for him, or that there was a reservation in his favor of any right not expressed therein, nor that there was no consideration for its execution, where he acknowledges therein the receipt of one. He cannot show by such evidence that the object or purpose of the deed was different from that implied by its terms, except where the instrument was executed to secure the payment of a debt or the performance of some other act. *Finlayson v. Finlayson*, 836.
2. **MAY BE REFORMED IN CASE OF MISTAKE** made in reducing its terms to writing, or it may be set aside for fraud or duress; and a trust may arise out of a transaction which will be enforced in face of the express terms of a deed, but it must be an implied trust, arising by operation of law. The parties to a deed cannot create a trust in favor of the grantor except by an instrument in writing declaring the same. *Id.*
3. **CONSTRUCTION OF WRITING — DEED OR WILL.** — In arriving at a conclusion as to whether a written instrument, doubtful in its character, but posthumous in its operation, is a deed or a will, the controlling inquiry is the intention of the maker, to be gathered primarily from the language of the instrument itself; but this does not preclude proof of instructions given to a draughtsman as to the nature of the paper he was

asked to prepare, nor of all attending circumstances which will aid in determining the maker's intention; and the fact that the paper has never been delivered, and could not operate as a deed, should be considered; for in such doubtful cases, if it could operate as a will, it will be so pronounced. *Sharp v. Hall*, 28.

6. **DEED TO THE HEIRS OF A**, he then having children living, vests an estate in them to the exclusion of his children subsequently born. *Tharp v. Yarbrough*, 439.
 8. **DEBT DUE FROM GUARDIAN TO WARD, WHEN NOT A CONSIDERATION.** — Money which a father owes his child as guardian does not constitute a consideration for a deed from the father to the child, so as to make the child a purchaser for value, and not a volunteer, in the absence of any consent by the child or sanction by the probate court to such an application of the debt. *Peck v. Peck*, 244.
 6. **MORAL OBLIGATION DOES NOT CONSTITUTE VALUABLE CONSIDERATION.** — Promise by a father to the mother on her death-bed that their child should have certain property creates a mere moral obligation, and does not constitute a valuable consideration for a deed of the property from the father to the child. *Id.*
 7. **EQUITABLE JURISDICTION TO RESTORE UNRECORDED LOST DEED.** — While a court of law can afford relief in case of an unrecorded lost deed, by permitting the party claiming under it to prove its contents in a suit then pending before it, still law cannot afford adequate relief from dangers that may arise from subsequent purchasers and judgment creditors without actual notice, while equity alone is capable of affording present relief and establishing safe-guards against future exigencies; and, having entertained jurisdiction for this purpose, it will, in suitable cases, retain it, and make a final adjudication between the parties. *Griffin v. Fries*, 351.
 8. **EJECTMENT — LOST DEED — CROSS-BILL.** — Where in ejectment defendant files his cross-bill praying that plaintiff be enjoined from further prosecuting his ejectment suit, on the simple allegation that a deed which is a link in his chain of title is lost, and not asking for the re-establishment of such deed, the bill is without equity and demurrable. *Id.*
- See CRIMINAL LAW, 28-32; ESTOPPEL, 4, 5; EXECUTIONS, 3; HUSBAND AND WIFE, 3; MARRIED WOMEN, 1-3.

DEFINITIONS.

1. **A BOOM IS AN INCLOSURE OR ARTIFICIAL HARBOR** for logs and lumber, of which one side is furnished ordinarily by the natural bank of the stream, and the other is provided by the piers and the timbers or other obstruction to the passage of logs which connect them together. *Powers's Appeal*, 882.
2. **WORDS "ON APPROVAL" HAVE WELL-UNDERSTOOD MEANING IN DIAMOND TRADE**, and as ordinarily interpreted, are neither inconsistent with an authority "to show" or an obligation "to return on demand." *Smith v. Glass*, 627.

See INSURANCE, 21, 25, 32, 33; JUDGMENTS, 2; LEGISLATURE, 1; WILLS, 1.

DEPOSITIONS.

- A PARTY MAY BE ALLOWED, AFTER THE TAKING OF A DEPOSITION**, to propose second or additional interrogatories for the purpose of laying a
- AM. ST. REP., VOL. XI. — 61

foundation for the impeachment of a witness, nor does the party propounding such additional interrogatories thereby make such witness his own. *Terry v. Rodakan*, 420.

DESCENT.

ESTATES OF DECEDENTS—EQUITABLE LIEN OF HEIRS.—Where an heir is administrator of the estate of his father, his co-heirs have no equitable lien on his interest for the payment of their respective shares, or his indebtedness to them arising from his fraudulent administration of the estate. *McClellan v. Solomon*, 381.

See **BASTARDY**, 1.

DIVORCE.

See **JUDGMENTS**, 4, 8; **MARRIAGE AND DIVORCE**, 1-8.

DURESS.

See **DEEDS**, 2.

EASEMENTS.

1. **OWNER OF LAND ABUTTING ON STREET HAS SUCH EASEMENT IN STREET** as enables him to insist, as against a street-railroad company, that it shall be devoted to such use only as is consistent with its purposes as a public street. *Huesner v. Brooklyn City R. R. Co.*, 679.
2. **RIGHT BY PRESCRIPTION TO MAINTAIN CULVERT SO CONSTRUCTED AS TO CAUSE PLAINTIFF'S LAND TO BE OVERFLOWED** may be acquired by a railroad company by user for twenty years. But the user must have been such as to have subjected the company to an action at any time during the twenty years, and the burden is on the company to show that at regular or irregular intervals during the twenty years, the water has overflowed the very land in controversy. *Emery v. Raleigh etc. R. R. Co.*, 727.

EJECTMENT.

1. **IN EJECTMENT, ALL DEFENSES** are excluded that are not legal, and neither equitable titles nor equitable defenses can avail as basis of recovery or defense. *McKay v. Williams*, 597.
2. **CROPS, TITLE TO, WHEN GROWN ON LANDS HELD ADVERSELY.**—Crops raised on land by the labor of one in adverse possession under a claim of right, or his agents, belong to him, and are not the property of the rightful owner of the soil; and such owner of the soil cannot assert title to the crops so raised, and, by waiving the tort, pursue and recover the specific articles, or their money value, in the hands of a stranger who received them from the adverse claimant of the land, or his tenants, and converted them to his own use. *Faulcon v. Johnston*, 737.
3. **INSTRUCTIONS—QUESTION FOR JURY.**—In an action of ejectment, where the defendant claims under a conveyance alleged to have been executed and then lost, it is error for the court to take from the jury the question whether such deed was executed or not, or to instruct them that if they believe that defendant bought the land, paid for it, and went into possession under his purchase, he got the legal title, whether a deed was made or not. *Terry v. Rodakan*, 420.
4. **FRAUDULENT CONVEYANCE—PROOF.**—Where one of the parties in ejectment claims title under a judgment sale against a fraudulent grantor,

and the other party claims title through a sale under decree against such grantor, the latter decree adjudging the conveyance fraudulent and subjecting the land to sale as the property of such grantor, the introduction in evidence by the latter party of the decree declaring the conveyance a fraud makes further proof of it unnecessary. *McClellan v. Solomon*, 381.

5. ESTATE OF DECEDENT. — Heirs at law cannot bring ejectment to recover real estate belonging to their ancestor while there is an administrator of such estate to whom letters have been duly issued, and the administration of such estate is incomplete and unsettled. *Doyle v. Wade*, 334.

See DEEDS, 8; HUSBAND AND WIFE, 3; PLEADING, 3.

ELECTIONS.

1. PURPOSE OF CONTESTED ELECTION LAWS IS TO INSURE SPEEDY TRIAL, so that the official term which is in dispute may not expire either in whole or in large part before the final determination is reached, and that the will of the people in the choice of public officers may not be defeated. *Whitney v. Blackburn*, 857.
2. NOTICE OF CONTEST IS FOUNDATION OF SUIT TO CONTEST ELECTION, and serves the double office of both summons and complaint, and should contain the title of the cause, specifying the name of the court and the names of the parties to the suit, and it must be served and filed within thirty days, according to the practice under section 2544 of the Oregon Code. *Id.*
3. IN PROCEEDING TO CONTEST ELECTION, NOTICE OF CONTEST SUPPLIES PLACE OF COMPLAINT in an ordinary action. The facts or combination of facts which give rise to the right of contest are to be briefly stated in the notice of contest, and this necessarily implies that they shall be stated sufficiently plain as to advise the defendant of the "cause" for which his election is contested. Certainty is required, but not technical precision of averment; and when the words used, taken in their ordinary sense, fairly serve to inform the adverse party of the substance of the facts relied upon to defeat his claim, it is sufficient. *Id.*
4. CONSTRUCTION OF STATUTES RELATING TO CONTESTED ELECTIONS. — Such statutes should be liberally construed by the courts, so that the rights of the people may be preserved, and that no protection may be afforded to fraud; yet one who undertakes to contest the right of another to an office to which such other has been declared elected, by a tribunal chosen by the people, ought to have some well-defined "cause," and to be able to state it with sufficient certainty as to notify or inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry. *Id.*
5. IN PROCEEDING UPON QUO WARRANTO TO CONTEST ELECTION, IT IS COMPETENT for the court to look behind the precinct election returns to ascertain for what office the votes cast for certain candidates were given; and especially is this so where the pleadings admit that the contestants were the opposing and competing candidates for the office in dispute, and were voted for as such at the various polling-places in the county. *De Berry v. Nicholson*, 767.
6. POWER OF CANVASSING BOARD. — Where the election returns from a polling precinct to the board of canvassers fails to show for what office the votes cast for certain candidates were given, it seems that the canvassing board may resort to the ballots themselves, or to the personal

- knowledge of a member of the board, to supply the defect or omission. *Id.*
7. **DESIGN OF ELECTION LAWS.** — Rules prescribed by statute for conducting popular elections are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, and to ascertain with certainty the result. Such rules are directory merely, not jurisdictional or imperative, and the forms which must be observed as essential to the validity of an election are those only which affect the merits. *Id.*
 8. **IRREGULARITY IN CONDUCT OF ELECTION,** which deprives no voter of his rights, nor admits a disqualified person to vote, nor casts any uncertainty upon the result, and which has not been occasioned by the agency of one seeking to derive a benefit from it, will be overlooked, when the only question is, which vote was the greatest. *Id.*
 9. **OATH OF ELECTOR.** — The oath prescribed by the North Carolina code, section 2681, to be taken by electors, in substance and legal effect fully meets the requirements of article 6, section 2, of the state constitution. *Id.*
 10. **ADMINISTRATION OF OATH TO ELECTORS.** — Where the form of oath used by the registrar was that prescribed in the statute, it will be inferred, in the absence of direct evidence to the contrary, that the oath was taken with uplifted hand, as specified in the statute, North Carolina code, section 3310, and was accepted as a valid mode of administering it by both the registrar and the elector. It is sufficient to meet the requirements of the election law that an oath was administered in a form sanctioned by the statute, and taken with a full recognition of its binding force. *Id.*
 11. **IRREGULARITIES IN MANNER OF CONDUCTING ELECTION.** — A disregard of directions found in the constitution or statutes, except as to the time and place of holding the election, the non-observance of which is designated as an irregularity merely, not affecting the result as a fair expression of the popular will, does not warrant a rejection of the vote given at a polling-place, and the same principle governs the registration of electors. *Id.*
 12. **REGISTRATION OF ELECTOR WHO IS QUALIFIED TO VOTE MUST BE ACCEPTED** as the act of a public officer, and entitles the elector to the casting of his vote. *Id.*
 13. **IT IS NOT SUFFICIENT REASON TO DEPRIVE QUALIFIED VOTER OF HIS VOTE,** that another has been registered who ought not to have been, and has no right to vote. *Id.*
 14. **ELECTION IS NOT VITIATED BY FACT THAT REGISTRATION-BOOK WAS NOT KEPT OPEN** during the whole prescribed period, on the Saturday preceding the election, when no one was denied the opportunity of examining the book. *Id.*
 15. **ELECTION IS NOT VITIATED BY FACT** that one of the election officers absented himself a short time from the polls, where it appears that no one voted during the interval, and that the ballot-boxes were not tampered with, and no opportunity was afforded for doing so. *Id.*
 16. **WHERE VOTES WERE HANDED IN ROLLED UP** and secured by an elastic band, and were distributed among the boxes by the judges, the provisions of section 2687 of the North Carolina code were not violated, and such votes were properly received and counted. *Id.*
 17. **PROVINCE OF JUDGE AND JURY.** — Where in response to an inquiry from the jury as to their right to pass upon the legality of certain votes,

the judge answered in the negative, and advised them that they should take and act upon the law as laid down by him, — in this, not as a mandate, but as advice, — there was no error. *Id.*

18. **BURDEN OF PROOF. — IN ACTION TO CONTEST RIGHT TO OFFICE, BURDEN OF PROOF IS ON PLAINTIFF,** when he seeks to introduce the ballots to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that they are the identical ballots cast by the voters. *Fenton v. Scott*, 801.
19. **BALLOTS AS BEST EVIDENCE. —** Ballots, when identified, are the best evidence, and are to prevail over the official count, yet, to entitle them to be resorted to and recounted, the facts going to show their preservation must fix their identity beyond any reasonable doubt. It is required that they be proven intact and genuine with a reasonable degree of certainty, and to the full satisfaction of the court, but this does not require that they must be proved genuine beyond all possible doubt, or beyond a mere possibility that they might have been interfered with. *Id.*
20. **REJECTION OF BALLOTS. —** If there has been such negligence in respect to the safe-keeping of ballots as to create reasonable doubts of their integrity, there is a want of that affirmative showing which the law requires to entitle to be recounted and to overturn the official canvass, and the rejection of the ballots by the trial court is not error. *Id.*
21. **IN ABSENCE OF EVIDENCE ALIUNDE, INTENTION OF VOTER IS TO BE OBTAINED** from the face of his ballot; and where a ballot discloses a name written opposite to a printed name erased, the intention of the voter is to be taken to be the substitution of the written for the erased name. *Id.*
22. **ERASURE OF NAMES ON BALLOTS. —** Where the face of the ballot showed that the voter had erased the names of two of the candidates for representative, and in proximity thereto, as much as the narrowness of the margin would admit, and almost directly against each of the erased names, had written two other names, one of which was the name of a candidate for county judge on another ticket, but the printed name of the county judge on such ballot was not erased, the facts do not disclose a case where two candidates were voted for for the same office, within the provision of section 2523 of the Oregon Code. *Id.*
23. **IN DETERMINING CONTESTED ELECTION, EVIDENCE OF BALLOTS ACTUALLY CAST WILL CONTROL** that furnished by the official canvass, provided the ballots have been duly preserved, and protected from the reach of any unauthorized intermeddling or tampering. It is a primary rule of elections that the ballots constitute the best evidence of the intention and choice of the voters. *Hartman v. Young*, 787.
24. **OFFICIAL RETURN OR CANVASS, WHEN DULY CERTIFIED, IS PRIMA FACIE EVIDENCE** that the result is as declared, but is never conclusive, unless made so by statute; and as between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the better evidence. *Id.*
25. **IN ACTION TO CONTEST RIGHT TO OFFICE, BURDEN OF PROOF RESTS UPON PLAINTIFF.** He must establish to the satisfaction of the jury or trial court, as the case may be, that the ballots are the genuine ballots cast at the election; otherwise they will receive no credence. Unless it is proved that the ballots are genuine, that is, the identical ballots cast, they should be rejected, and not be permitted to overturn the result as declared by the official count. *Id.*

26. **STATUTORY PROVISIONS FOR SAFE-KEEPING OF BALLOTS ARE DIRECTORY MERELY**, and if the ballots have been safely kept, and protected from any tampering, the chief object of the law is subserved, and the ballots are admissible in evidence, although there may have been some omission to comply strictly with the statutory directions. *Id.*
27. **BALLOTS AS BEST EVIDENCE.** — Where the court finds that the ballots were securely and safely kept and preserved, that no one had tampered with them, and that, notwithstanding the box had been opened in the manner and for the purpose stated, the ballots therein were the genuine and identical ballots cast by the voters of South Pendleton precinct, the legal conclusion reached by the trial court upon this state of facts, viz., that such ballots "are the best evidence, and entitled to be recounted," is in conformity with such as the law declares. *Id.*
28. **SCRATCHED BALLOT — MANDAMUS.** — Where there is enough on the face of the ballot to call for the exercise of judgment by the election inspectors as to whether it was "scratched," and they, so exercising their judgment, decide that it is "scratched," and should not be counted, such decision cannot be reviewed or controlled by mandamus. *State v. Deme, 343.*

See PROCESS.

EMINENT DOMAIN.

1. **TITLE SUFFICIENT TO MAINTAIN PROCEEDINGS FOR DAMAGES FOR LAND TAKEN.** — Proceeding to assess damages against a railroad company for entering land under the right of eminent domain is properly brought in the name of an administrator who bought the land at sheriff's sale, under a judgment obtained against his intestate (the former owner) in his lifetime, the entry by the company having been made after such purchase, though prior to the execution, acknowledgment, and delivery of the deed. Whether such purchaser holds the title as owner, or as trustee for the heirs at law of his intestate, is a question determinable after the damages have been fixed and the money paid into court. *Pennsylvania etc. R. R. Co. v. Cleary, 913.*
2. **MEASURE OF DAMAGES FOR LAND TAKEN BY VIRTUE OF.** — In a proceeding to assess damages for land taken for railroad purposes, it is proper to inquire what the whole tract was worth, having in view the purposes for which it was best adapted; but testimony showing how many building-lots the tract could be divided into, and what such lots would be worth separately, is inadmissible; and equally incompetent is evidence offered to show that the owner had declined to sell or lease the land, or the reasons he gave therefor, his views upon this subject being irrelevant to the inquiry before the jury. The true measure of damages is found in the difference between the fair selling value of the land before and after the entry complained of. *Id.*

EQUITY.

1. **LACHES.** — COURTS OF EQUITY HAVE NOT ADOPTED the maxim of the common law, that wherever there is a right there is a remedy for its infringement. And if a party looks on and remains silent until large sums have been expended or important intervening interests have grown up, the fact that he might have successfully objected at the outset will not avail him. *Powers's Appeal, 392.*

2. **INJUNCTION.** — PARTY MUST NOT ONLY APPEAR IN COURT OF EQUITY WITH CLEAN HANDS, but he must come with reasonable promptness, in good faith, and with a just and equitable demand. And if an injunction is prayed for where, upon a consideration of the whole case, it ought not in good conscience to issue, a mere legal right in the plaintiff will not move the chancellor. *Id.*
3. **RIGHT LOST BY LACHES.** — IT IS TOO LATE FOR PROPERTY OWNERS INJURED by the erection of an addition to a boom, in which, and in business enterprises depending upon it, thousands of dollars have been invested, to assert, after an acquiescence therein for fourteen years, that the boom company had no right, under its charter, to build the addition in the way it was built. *Id.*
4. **LACHES.** — Children inheriting real estate from their mother, subject to their father's rights as tenant by the curtesy, are not guilty of laches in remaining silent for more than thirty years, during which time their father was alive, and he and his grantees laid out and platted a town on such realty, and were in possession thereof; for such possession was lawful and consistent with the father's estate, and neither the children nor their grantees had any right to disturb it. *Orthwein v. Thomas*, 159.
See CONTRACTS, 1; DEEDS, 7; EJECTMENT, 1.

ESTOPPEL.

1. **ESTOPPELS, TO BE BINDING,** must be mutual. *Ferguson v. Jones*, 808.
2. **OUTSTANDING TITLE.** — Where both parties claim title to land from a common source, defendant is estopped from setting up an outstanding title with which he is disconnected. *Doyle v. Wade*, 334.
3. **VENDOR OF HIDES IS ESTOPPED FROM CLAIMING TO RECOVER FOR ALLEGED SHORTAGE** in the weight of the hides sold by him, where, after discovering that he has been defrauded by short weights, he settles with the vendee according to the latter's reports of such weights, without making any claim for the shortage, or even calling the vendee's attention to the matter. *Reid v. Ladue*, 462.
4. **THE RECITALS IN A DEED OPERATE BY WAY OF ESTOPPEL** upon the grantee, and after its record, upon his grantees. *Orthwein v. Thomas*, 159.
5. **IF A DEED DOES NOT OPERATE TO PASS TITLE WHEN IT IS MADE,** because the grantor has none, and he afterwards inherits an interest therein, such interest will pass to his grantee on the principle of estoppel, under the code of Georgia. *Terry v. Rodakan*, 420.
See BOUNDARIES, 3; JUDGMENTS, 1; RAILROAD CORPORATIONS, 13.

EVIDENCE.

1. **IN AN ACTION TO RECOVER COMPENSATION FOR CAUSING DEATH OF PLAINTIFF'S HUSBAND,** the defendant is entitled to prove, in addition to the ordinary expenses of such husband, what were his habits of life, and his manner of living and of spending money. *Terry v. Rodakan*, 420.
2. **EVIDENCE IS ADMISSIBLE TO EXPLAIN MEANING OF TERMS USED IN PARTICULAR TRADE,** when their meaning is material to construe the contract, and the rule extends to forms of expression as well as to single words. *Smith v. Clews*, 627.
3. **EVIDENCE OF USAGE IS ADMISSIBLE TO APPLY WRITTEN CONTRACT TO SUBJECT-MATTER** of the action, to explain expressions used in a particular

- sense by particular persons as to particular subjects, and to give effect to language in a contract as it was understood by those who made it. *Id.*
4. **ORAL EVIDENCE OF CIRCUMSTANCES ATTENDING EXECUTION OF INSTRUMENT IS ADMISSIBLE**, as between the parties, to aid in the interpretation of words used therein, where such words, in their application to the instrument of which they are a part, are not entirely intelligible. Where, therefore, a draft was drawn upon the defendant, with the word "executor" after his name, payable at a time specified, with direction to charge the same against the drawer, and of his mother's estate, and the defendant accepted it, adding the word "executor" to his name, in an action by the plaintiff, who was the wife and indorsee of the payee, against the defendant, who was the executor of the will of the drawer's mother, evidence is admissible, on the part of the defendant, to show that when the draft was drawn it was understood by the plaintiff and her husband that it should be taken upon the security of the drawer's interest in the estate of his mother; that it was then understood between the drawer, payee, and the plaintiff that it was to be paid out of such interest, and that the defendant then stated, in their presence, that he would accept in his capacity as executor, to be paid only out of the drawer's interest in the estate. This evidence is competent as bearing upon the understanding of the relation and the character of liability which the defendant assumed by his acceptance of the draft. *Schmittler v. Simon*, 621.
 5. **VALUE**. — Where an article has no market value, its value may be shown by proof of such elements or facts affecting the question as may exist. Recourse may be had to the items of cost and its utility and use, and the opinion of witnesses properly informed on the subject may be given in respect to its value. *Sullivan v. Lear*, 388.
 6. **VALUE OF FRANCHISE**. — A franchise or bare right to do a thing has no market value, when considered with reference to itself alone, and exclusively of its utility. To determine its value, resort must be had to evidence of the practical uses to which it can be put, or the profit which by proper management can be made out of it. *Id.*
 7. **VALUE OF FRANCHISE**. — Where a franchise is without value, and of such character as to render both an expenditure of money and the application of business judgment and skill in its management necessary to make it useful and profitable, its value must be determined by a consideration of it in connection with such possibilities. *Id.*
 8. **VALUE OF FRANCHISE — OPINION**. — The opinion of a witness as to the value of a franchise to build a wharf, when based upon his own experience in building and operating such a wharf, or when based upon an assumption of profit to be derived from the operation of such a wharf, is admissible; nor is the evidence rendered inadmissible from the fact that the witness cannot state the value of such franchise when taken alone, and not considered in connection with the improvements of which it is capable, or the ability of the owner to make use of it. *Id.*
 9. **VALUE OF FRANCHISE**. — The price charged by a city granting a franchise is not conclusive as to its value in an action involving that question between the grantee and his vendee. *Id.*
 10. **VALUE**. — Where the subject-matter of sale has no market value, the latter is peculiarly for the jury to determine, and whatever seems calculated to aid them in reaching a correct conclusion should be submitted for their consideration. *Id.*

11. **CONSIDERATION.** — Where a deed or assignment acknowledges the receipt of a valuable consideration, without specifying what it is, parol evidence is admissible to prove its character. *Id.*
12. **CONSIDERATION.** — Where a deed or assignment recites that it is given "for value received," such recital does not exclude parol evidence that the consideration for the conveyance was of an executory character, and consisted of a promise, and the jury may so determine under such proof. *Id.*
13. **ADJUDICATION OF RECORD IS EVIDENCE** against all the world to establish the fact that such a judgment was rendered, and of all the legal consequences necessarily resulting from that fact. *Faulcon v. Johnston*, 737.
14. **PRINCIPLE WHICH REQUIRES PRODUCTION OF WRITING TO PROVE ITS CONTENTS,** and excludes parol proof thereof, has no application when the inquiry into its contents comes up collaterally at the trial, and the contents are not directly involved in the controversy. *Id.*
15. **FACT THAT ONE IN POSSESSION OF LAND LISTED IT IN HIS OWN NAME** for the purpose of taxation, though of slight, if of any, import as evidence of title, is receivable as showing a claim of ownership, for the reason that it is an act done in pursuance of the requirements of law. *Id.*
16. **IT IS NOT ADMISSIBLE FOR COUNSEL TO BE QUIET AND ALLOW EVIDENCE TO COME OUT, AND TAKE ADVANTAGE OF IT,** if favorable, and if not, to ask that it be stricken out, and not considered; and still less can he complain when it comes out in response to his own inquiries, and its withdrawal afterwards from the jury rests in the unreviewable discretion of the trial judge. *Id.*
17. **ORIGINAL ENTRY MADE BY WITNESS IS ONLY ADMISSIBLE AS AUXILIARY TO HIS EVIDENCE** when he is unable to distinctly recollect the fact without the aid of it. The rule which renders such an entry admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which it relates. *National etc. Bank v. Madden*, 633.
18. **OPINIONS AND SURMISES NOT TESTIMONY.** — The fact that a vendee of hides made a mistake or acted fraudulently in weighing them on two or three occasions during the last year of his dealings with the vendor is not evidence from which it can be presumed that he did so eight years before. Nor is it competent for the vendee, in an action brought to recover for the shortage in weights, to give his opinion that he had been unfairly dealt with during the intervening years, and thus undertake to fix an average per hide by which the suspected shortage may be measured and ascertained during those years. *Reid v. Ladue*, 462.
19. **INTENTION** is an inferential act, and, unless announced at the time the is done, is not susceptible of direct proof. *Sharp v. Hall*, 28.
20. **INCOMPETENT EVIDENCE** once admitted may be rebutted by other incompetent evidence. *Id.*
21. **EVIDENCE OF NARRATION BY DECEASED OF WHAT ACCUSED SAID OR DID** a day or days before such narration is hearsay, and inadmissible. *People v. Aikin*, 512.
22. **EXPERT CANNOT BE PERMITTED TO STATE THAT HE HAS READ OR HEARD TESTIMONY** of a witness or witnesses, and then base his opinion upon such testimony, without stating the particular points of the evidence — the facts — upon which he rests his conclusion; but he may be asked, on cross-examination, to state how he differs from what was said by other physicians sworn as experts in the case, as such inquiry itself calls upon

- him to state what they said, and to give his reasons, if any, why he differed from them. *Id.*
23. WHERE PLAINTIFF'S CAUSE OF ACTION IS BASED UPON TRANSCRIPT OF RECORD OF JUDGMENT rendered by a justice of the peace in another state, duly certified as prescribed by the statute of the state where action is brought, such transcript is evidence *prima facie* of what appears upon its face, namely, that the defendant's liability upon a contract debt has been merged in a judgment. *Evans v. Cleary*, 886.
 24. EXCEPTION TO EVIDENCE ADMITTED IS NOT AVAILABLE ON APPEAL, where no objection is made until after its admission, and no motion is made to strike it out. *Hangen v. Hachemeister*, 691.
 25. EVIDENCE OF PLAINTIFF'S RECEIPTS AND DISBURSEMENTS FOR TWO WEEKS prior to the taking and carrying away of his property, as alleged in his complaint, is properly admitted for the purpose of determining the amount of his damages, where the complaint alleges that the taking of the property broke up, injured, and destroyed his business. *Id.*
 26. EVIDENCE OF PRICE PAID FOR PROPERTY WITHIN THREE WEEKS before the taking of it is admissible for the purpose of proving its value at the time of the taking, where there is no pretense that it has changed in value during that time. *Id.*
 27. ADMISSIONS OF AN ANCESTOR, which could affect him were he a party, are receivable in evidence against his heirs. Hence, in an action where the plaintiffs' title is partly as heir of their father, a letter written by him tending to show that he had made a sale and conveyance of the property to the defendant is competent evidence against such heirs. *Terry v. Rodahan*, 420.
 28. RES GESTÆ. — Declarations as to defect in engine, made by officers of a railroad company, after an accident, resulting in the death of one of the company's employees, constitute no part of the *res gestæ*, and are not admissible as evidence on the part of the plaintiff in an action against the company for negligently causing such death, when not offered in contradiction of prior testimony of such officers. *Erie etc. R. R. Co. v. Smith*, 895.
 29. ERROR IN ADMITTING EVIDENCE WHICH TENDS TO PREJUDICE the minds of the jurors is not cured by a direction in the charge of the court to the jury to disregard the evidence, and by a withdrawal of it from their consideration. The instruction comes too late to cure the mistake. *Id.*
 30. BURDEN OF PROOF IN ACTION FOR NEGLIGENCE. — When a railway passenger is injured or killed by an accident due to the alleged negligence of the railroad company, the burden of proof rests upon the company, in an action against it for damages, to rebut the presumption of negligence arising from even slight evidence of the defective construction of its track; but in the case of an employee of the company so injured or killed, there is no such presumption to be overcome, and the plaintiff must affirmatively prove the fact of negligence, and that it is such a kind of negligence as violates the special and limited duty of an employer to an employee. *Id.*
- See BOUNDARIES, 1, 3; CHATTEL MORTGAGES, 2; CONTEMPT, 4; CONTRACTS, 1, 2; CRIMINAL LAW, 2, 5-8, 16, 28-35, 44-46, 57, 58, 71, 72; DEEDS, 1, 3; DEPOSITIONS; EJECTMENT, 4; ELECTIONS; FRAUDULENT CONVEYANCES, 2, 3; MALICIOUS PROSECUTION, 7; MORTGAGES, 7; NEGOTIABLE INSTRUMENTS, 8; RAILWAY COMPANIES, 11, 12; TRIAL, 9.

INDEX.

EXECUTIONS.

1. **VALIDITY OF LEVY ON PERSONAL PROPERTY.** — As against all persons, except junior execution creditors, a levy upon personal property is good and valid, where the officer goes to the property so as to have it in his power to take it into actual possession, if he chooses, and indorses the levy on his process. But as against junior execution creditors, the lien of the levy is lost, unless the officer takes the property, and retains actual possession thereof, either in person or by his agent, until a sale. *Sawyer v. Bray*, 713.
2. **TO PROTECT BONA FIDE PURCHASERS FOR VALUE, AND OTHER EXECUTION CREDITORS,** it is provided by the North Carolina code, section 448, that the lien of an execution, as to them, shall operate only from the levy; but this provision does not change the existing law as to what shall constitute a levy, nor alter the character and effect of the lien acquired by it. *Id.*
3. **PURCHASER — NOTICE.** — Where a judgment creditor has neither actual nor constructive notice of a prior unrecorded deed, it is of no consequence whether the purchaser at an execution sale under such judgment has notice of such deed or not. *Doyle v. Wade*, 334.
4. **LEVY AND SALE ARE VOID WHEN MADE BY AN INTERESTED SHERIFF,** as where he appears from the execution to be one of the persons beneficially interested in the judgment, to satisfy which the levy and sale are made. *Knight v. Morrison*, 405.
5. **AFTER THE PAYMENT OF AN EXECUTION,** it is *functus officio*, and a subsequent sale thereunder conveys no title. *Id.*
See CONTEMPT, 8; PARTNERSHIP, 4; PENSIONS, 1, 2; SALES, 2.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATOR MAY DISAFFIRM AND TREAT AS VOID MORTGAGE MADE BY HIS INTESTATE** in fraud of the rights of the latter's creditors. The administrator represents the creditors as well as the estate. *Hangen v. Hackmeister*, 691.
2. **ESTATE OF DECEDENT — PETITION FOR FINAL DISTRIBUTION CANNOT ASK FOR ACCOUNTING.** — Petition by an administrator for the final distribution of the estate of the decedent cannot properly contain averments for the purpose of charging a distributee with, and compelling him to account for, property of the deceased, especially for property which came into his possession in another state. *Estate of Cook*, 267.
See EJECTMENT, 5.

EXPERTS.

See EVIDENCE, 22.

FACTORS.

1. **COMMISSION MERCHANT IS BOUND TO ASCERTAIN CHARACTER OR QUALITY OF GOODS** consigned to him without any communication to him from the consignor as to their character or quality, and to put them upon the market for what they are in that respect. He has no implied power to undertake that the goods are in any respect other than or different from what they actually are. And if he goes beyond his authority, and warrants the quality of the goods, the warranty will be his

own, and he will be personally liable for its breach. *Argersinger v. Macnaughton*, 687.

2. A FACTOR MAY, BY CONTRACT, GUARANTEE the collection of the price of goods to be sold, and also that their sale shall realize certain sums. *First Nat. Bank v. Schoon*, 174.

FRAUD.

1. FRAUD WILL VITIATE CONTRACT; but where the parties stand upon an equality of footing, the fraud must consist of a false representation of a material fact, and the party to whom it is made not be able, by the exercise of a reasonable caution and vigilance, to detect its falsity. *Finlayson v. Finlayson*, 836.
2. TO SUPPORT ACTION OF DECEIT, PROPERLY SO CALLED, IT MUST APPEAR that the fraudulent representation complained of was untrue, that the defendant knew, or ought to have known, at the time it was made, that it was untrue, and also that it was calculated to induce the plaintiff to act upon it, and that, believing it to be true, he was induced to act accordingly. *Hezter v. Bass*, 874.
3. DECEIT. — IF ONE IS THROWN OFF HIS GUARD AND DECEIVED BY FALSE AND FRAUDULENT WARRANTY, IT IS SUFFICIENT, to prove the warranty broken, to establish the deceit; for a person will be presumed to know of the existence or non-existence of a fact which he undertakes to warrant. *Id.*
4. EVIDENCE. — ASSIGNEE OF MORTGAGE HAS RIGHT OF ACTION IN DECEIT against the assignor, who gave a false certificate at the time of the assignment, that he had not received any payment upon the notes described in the mortgage, except what had been realized upon a sheriff's sale, and the action will lie, although the transfer of the mortgage was without recourse to the assignor in any event whatever. In such action the plaintiff may read in evidence the record of a *scire facies* which he had previously instituted on said mortgage, wherein a judgment was rendered against him, the record including the pleadings, findings of fact, and conclusions of law by the court, for the purpose of showing the particular ground of such judgment against him. And it is also proper to prove a former suit in equity between the plaintiff and defendant, for the purpose of showing that the consideration for the transfer of the mortgage was the release by the plaintiff of his claims in that suit. *Id.*

FORGERY.

See CRIMINAL LAW, 27-35.

FRANCHISE.

See EVIDENCE, 6-9.

FRAUD.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; CONTRACTS, 2; CRIMINAL LAW, 68; DEEDS, 2; DESOENT; ESTOPPEL, 3; EVIDENCE, 18; NEGOTIABLE INSTRUMENTS, 5; STATUTE OF FRAUDS, 4; TAXATION, 3; VENDOR AND VENDEE, 1-3; WILLS, 9.

FRAUDULENT CONVEYANCES.

1. CONVEYANCE WILL NOT BE SET ASIDE AS A FRAUD ON THE CREDITORS OF THE GRANTOR, if it appears that he had no title at the time of making such conveyance. *Clark v. Wilson*, 143.
2. EVIDENCE — ADMISSION OF GRANTOR. — Conveyance cannot be proved by admission of a person who has never been in possession of the property, but from whom the defendant has a conveyance, if the title of the defendant was perfect without such conveyance, and he has never relied thereon. *Id.*
3. EVIDENCE. — IN AN ACTION TO SET ASIDE A CONVEYANCE AS FRAUDULENT, THE ANSWER OR CONFESSION of the grantor or grantee cannot be admitted as evidence against one who claims under them, if he has answered denying the material allegations of the bill. *Id.*
4. FRAUDULENT CONVEYANCES, AS REGARDS BURDEN OF PROOF, ARE CLASSIFIED AS FOLLOWS: 1. When fraud appears so clearly upon the face of the deed as to be incapable of explanation *de hors*, there is a conclusive presumption of fraud. 2. When the law raises a presumption of fraud because of the relation of the parties to a transaction, or the circumstances attending it, and if rebutting evidence is offered, the issue must be left to the jury. 3. As a general rule, where there is only evidence of such circumstances as naturally excite suspicion as to the *bona fides* of a transaction, the issue involving the question as to its fraudulent character should be left to the jury, with instructions that such circumstances are badges of fraud, and should be scrutinized closely in passing upon the issue. *Brown v. Mitchell*, 748.
5. HUSBAND AND WIFE — VALIDITY OF TRANSFER OF PROPERTY BETWEEN. — If property be transferred by a husband to his wife, in payment of his indebtedness to her, the burden rests upon the wife to show, by a preponderance of evidence, that her husband was in fact indebted to her, but having established that fact, the question of fraud in the transfer is an open one for the jury to determine, under a caution from the court that they should scrutinize the transaction closely, because of the relation of the parties. In such case, though the husband intended to defraud his creditors, the validity of the transfer to the wife would not be destroyed, unless she participated in the intent or had knowledge thereof. *Id.*
6. HUSBAND AND WIFE — CONSTRUCTIVE DELIVERY OF CHATTELS. — Where a husband executes and delivers a bill of sale of chattels to his wife, without an actual delivery of the chattels, and tells her that the property is hers, and she accepts the bill of sale and gives her husband authority to hold the property as her agent, and he uses the property as hers, and for the benefit of the family, according to her directions, this will in law constitute a constructive delivery of the property, and a good title thereto vests in the wife. *Id.*
7. HUSBAND AND WIFE — CONVEYANCE FROM HUSBAND TO WIFE. — Where a wife handed the proceeds of the sale of her land and timber to her husband as a loan, which he orally promised to repay, and ten years afterwards he executed to her a bill of sale conveying chattels equal in value to the amount of the loan, with interest, it was held that the husband's oral promise to repay the loan was valid, and that his conveyance of the chattels directly to his wife was not voluntary. *Id.*

See AGENCY, 6-8; ATTACHMENT, 2; CHATTEL MORTGAGES, 2, 5; EJECTMENT, 4; EXECUTORS AND ADMINISTRATORS, 1; JUDGMENTS, 18, 19.

GARNISHMENT.

See ATTACHMENT; PARTNERSHIP, 2.

GUARDIAN AND WARD.

1. OBJECTION TO LEGAL CAPACITY OF GENERAL GUARDIAN OF INFANT TO SUE in his own name, as such guardian, for an injury to his ward's estate, is waived, if not taken by demurrer or answer. *Perkins v. Stimmett*, 659.
2. ACTION AT LAW AGAINST SURETIES ON BOND OF GENERAL GUARDIAN cannot be maintained until proceedings for an accounting have been had against such guardian, and his default has been established therein; and this rule applies although the guardian has died, since his personal representatives may be required to account, and before the sureties can be sued, proceedings in the surrogate's court must at least establish the fact that none of the infant's property has come into the administrator's possession. In the absence of a decree to that effect, the presumption is that the administrator has possession of the infant's estate, and until it is otherwise established, a *devastavit* will not be presumed. *Id.*

See DEEDS, 5.

GUARDIAN AD LITEM.

See INFANTS.

HABEAS CORPUS.

See CONTEMPT, 1, 5; CRIMINAL LAW, 2.

HIGHWAYS.

1. OBJECT OF PUBLIC ROAD IS TO AFFORD EASY, CONVENIENT, AND REASONABLY SAFE MEANS OF PASSAGE for persons traveling thereon, with horses, wagons, etc., and the duty of the township is, as far as practicable, to do what is reasonably necessary to secure that object, having reference to the kind of road, its peculiar location, its adjacency to places of peril, and the amount and kind of travel it accommodates. *Township of Plymouth v. Graver*, 867.
2. GENERAL RULE IS, THAT TOWNSHIP IS NOT RESPONSIBLE FOR CONDITION OF SURFACE of land outside the limits of the highway, nor is it bound to fence the road merely to prevent travelers from straying out of the path; but it is liable for injuries to a traveler on the road, caused jointly by a defect therein and a defect in the adjoining premises, if the defect in the road was the proximate cause of the injury. *Id.*
3. TOWNSHIP IS HELD TO DO WHATEVER IS REASONABLE AND PRACTICABLE TO AVERT THREATENED DANGER TO TRAVELER, where such danger arises from an imperfection in the highway itself, from an excavation in it outside the traveled route, from the existence of a declivity or a stream of water at the roadside, or from a railroad upon which locomotives and trains are accustomed to pass, if there be a concurrence of circumstances which renders the road a place of peril. *Id.*
4. WHETHER DANGEROUS PLACE, NOT WITHIN HIGHWAY, BUT ADJACENT TO OR NEAR IT, is in such close proximity to the highway as to render its use unsafe for public travel, is a matter to be submitted to the judgment and experience of the jury upon a consideration of all the facts respecting it. *Id.*

5. **DAMAGES FOR INJURY CAUSED BY DEFECTIVE HIGHWAY.** — The plaintiff prevailing in an action against a township, brought to recover for an injury sustained by reason of a perilous highway, is not entitled to recover interest, as such, upon the amount the jury might ascertain his damages to have been; but in fixing upon the amount of the verdict, they may consider the time which has elapsed since the injury was received. *Id.*
6. **OBSTRUCTION OF.** — A grant of power to a railroad company to construct its road, along, upon, or across, and use, a highway is not, in the absence of express grant to the contrary, a power to so construct the road as to block the highway, so that it cannot be used by the public while trains are not passing over it, or the company is not otherwise properly using the track. *Palatka etc. R. R. Co. v. State*, 395.
7. **OBSTRUCTION OF — RAILROADS.** — Grant of power to a railroad company to carry a highway which may be touched, intersected, or crossed by the track over or under it, "as may be found most expedient for the public good," and to change the line of the highway where an embankment or cutting calls for it, or it is desirable with a view to a more easy ascent or descent, and to acquire additional land for the construction of such highway on a new line, shows a clear intent to preserve to the public a highway, either the old one on the old surface or on a new surface, or new highway; also that when the conditions of locality are such that both roads cross on the same surface, the highway may be passed over the railroad or under it, according to the public good; also that when the conditions are such as not to permit, consistently with its practical use, the grading of the highway to the railroad cut or embankment, to authorize a detour or change in the route of the highway, the latter, after being established upon land acquired by the company, to be maintained as other public highways, open to the public, and not as a private road of the company. *Id.*
8. **OBSTRUCTION OF.** — Where power is granted to a railroad company concerning crossings and intersections of highways, which includes power to alter the grade of the highway so as not to substantially impair its usefulness in case there is a cut or embankment, and the level of the highway is graded down or up to the surface of the track therein in such manner and at such angle as not to work any substantial detriment to persons or vehicles traveling the highway, the company does not transcend its powers; and where the topography of the country is such that the cut or embankment makes a change of line of the highway either necessary or desirable, to make a more easy ascent or descent, such change may be made; but where the road passes along instead of across the highway, it must be so constructed as not to destroy or obstruct the latter, or prevent its use by the public. *Id.*
9. **INDICTMENT FOR OBSTRUCTING PUBLIC HIGHWAY** is sufficient when it describes it as "a common highway in Putnam County, in this state [Florida], made and laid out for the people of this state to go, return, and pass at their free pleasure and will, on foot, on horseback, and in vehicles." Such description is equivalent to an allegation under the statute that it is an "established highway." *Id.*
10. **OBSTRUCTION OF — INDICTMENT.** — The statutes of Florida prescribing the powers and duties of railroad and canal companies as to crossing highways do not affect the rules of pleading controlling indictments for obstructing highways further than to require that the act alleged and charged shall appear not to be authorized by such statutes. *Id.*

11. **INDICTMENT AGAINST RAILROAD COMPANY** for obstructing a highway is sufficient, under the Florida statute, when it alleges a complete and absolute closing of such highway against travel. *Id.*
12. **OBSTRUCTION OF.** — A grant to a railroad company of the right to construct its road along, upon, or across, or to use, an existing highway, in the absence of express words to the contrary, is not to be construed as a power to destroy such highway. *Id.*
13. **OBSTRUCTION OF.** — A grant of power to a railroad company to make a new road or open a new way across an existing highway, in the absence of an express provision to the contrary, leaves the railroad company under obligation to leave every highway it crosses in a safe condition for the use of the public, and to cause as little injury as possible to the old highway. *Id.*

HOLIDAYS.

See **PROCESS.**

HOMESTEAD.

PRESENTATION OF CLAIM AGAINST ESTATE OF HUSBAND, WHERE CLAIM IS SECURED BY MORTGAGE OF HOMESTEAD UPON WIFE'S SEPARATE PROPERTY. — Mortgagee need not present his claim against the husband's estate, in California, if he waives all demands against the estate, where the mortgage to secure the husband's debt is of a homestead upon the separate property of the wife. *Bull v. Cox*, 235.

See **MORTGAGES**, 1, 4, 5.

HOMICIDE.

See **CRIMINAL LAW**, 40-63.

HUSBAND AND WIFE.

1. **WIFE'S FUNERAL EXPENSES.** — Where a husband is able, it is his duty to pay his wife's funeral expenses, and in the absence of proof of his inability so to pay, they cannot be charged against her estate. *Galloway v. Estate of McPherson*, 596.
2. **IMPROVEMENTS MADE BY HUSBAND ON WIFE'S LAND.** — A husband conveyed to his wife, in her own right, valuable premises which he had acquired by the joint labor and earnings of both since their marriage. He was induced to make the conveyance through the urgent solicitations of his wife, and her assurances that he should enjoy the premises with her as a home in the future as he had previously; and after the conveyance she urged him by similar assurances to make improvements on the land, which he did at an expense to himself of at least four thousand dollars. After the completion of said improvements, and about three years and a half after the conveyance, during which time they had occupied the premises as formerly, the wife expelled the husband therefrom. In such case, the solicitations and assurances of the wife, and her subsequent expulsion of the husband from the premises, did not amount to such fraud as would justify a court of equity in setting aside the conveyance; but to urge him to make the improvements with the understanding that he was to enjoy them, and then deny him the right, without paying him therefor, was bad faith, and fraudulent, and the expenses incurred by the husband in making the improvements

should be paid to him by the wife, and the amount thereof be made a charge upon the premises in his favor. *Finlayson v. Finlayson*, 836.

3. **DEED FROM HUSBAND TO WIFE.** — Prior to February 28, 1887, when the statute defining the rights of married women in Alabama went into effect, a deed from the husband directly to his wife did not vest the legal title in her, and consequently an action of ejectment founded on such title could not be maintained prior to that date. *Manning v. Pippen*, 46.
 4. **A WIFE NOT A PARTY TO AN ACTION BROUGHT BY HER HUSBAND** cannot be affected by any judgment or other relief he may obtain therein declaring him to be the owner of real estate which in fact belongs solely to her; nor can any deed obtained by him pursuant to such judgment amount to color of title. *Orthwein v. Thomas*, 159.
- See FRAUDULENT CONVEYANCES, 5-7; HOMESTEAD; MARRIED WOMEN, 4; MORTGAGES, 5; MARRIAGE AND DIVORCE.**

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

- GUARDIAN AD LITEM NEED NOT BE A SOLICITOR.** The fact that the acts of such guardian after the appointment are erroneous cannot be held to relate back, and divest the court of the personal jurisdiction which authorizes it to make the appointment. *Maloney v. Dewey*, 131.

See SPECIFIC PERFORMANCE.

INSANE PERSONS.

1. **SUIT MAY BE COMMENCED AGAINST A LUNATIC.** — The complainant is not bound to ascertain the mental capacity of the defendant, and have a conservator appointed before bringing suit. *Maloney v. Dewey*, 131.
2. **LUNATIC PROPERLY BEFORE THE COURT IS BOUND** by acts done by matter of record, as fines, recoveries, judgments, recognizances, and the like. *Id.*
3. **IF A DECREE IS ENTERED AGAINST A LUNATIC IN A COURT OF THE UNITED STATES** having jurisdiction over him, relief from such decree must be sought in the same court. The state courts cannot review such decree nor grant any relief therefrom. *Id.*

INSTRUCTION.

1. **INSTRUCTION TO JURY** that if they should believe a certain state of facts the plaintiff is not entitled to recover, though proper upon the general issues submitted, under the practice at common law, is confusing when applied to the system of code practice, and should not be continued. *Farrell v. Richmond etc. R. R. Co.*, 760.
2. **LIQUOR LAWS.** — Where a party is prosecuted under an indictment charging him with pursuing the occupation of retail liquor dealer without license, instructions are not erroneous because they substitute "without having paid the tax" for "without having obtained a license," when under the law the accused could not be convicted had he paid the tax, whether he procured the license or not. The instructions are more favorable than the law. *Fahey v. State*, 182.
3. **INSTRUCTIONS ASSUMING FACTS.** — Where one party admits a fact at the trial, and the other party produces no evidence to prove it be-
AM. ST. REP., VOL. XI.—62

- cause of its admission, the court is justified in assuming it to exist, and so charging the jury without further proof. *Id.*
4. **ABSTRACT INSTRUCTION WHICH COULD NOT HAVE MISLED JURY.** — Purely abstract instruction which could not have misled the jury, in view of all the circumstances of the case, will not be reviewed on appeal. *Hill v. Finigan*, 279.
5. **HARMLESS ERROR — ASSUMPTION OF FACT IN APPELLANT'S FAVOR, AND OF UNDISPUTED FACT.** — Instruction erroneously assuming a fact in favor of the appellant cannot be complained of by him; nor can the assumption of an undisputed fact in an instruction injure him. *Id.*

INSURANCE.

1. **IF PROOFS OF LOSS ARE SERVED AND RETAINED BY AN INSURANCE COMPANY WITHOUT OBJECTION,** and the company refuses to pay the loss upon some other grounds than defects in the proofs, all further performance of the conditions in relation to proofs of loss is waived, and the company is estopped from making any formal objections to the proofs. *Continental Ins. Co. v. Ruckman*, 121.
2. **GENERAL AGENTS, WHO ARE.** — One representing an insurance company in a particular locality, and supplied with blank policies properly signed by the company, which he is authorized to fill up, counter-sign, and deliver to the assured, is a general agent in the matter of soliciting and accepting risks and agreeing upon a settlement of terms of insurance, and carrying such agreement into effect by the issuing of policies. *Id.*
3. **A GENERAL AGENT OF AN INSURANCE COMPANY WILL BE PRESUMED TO POSSESS** competent authority to stipulate for an insertion in an insurance contract of a clause relating to the occupancy of the buildings to be insured. *Id.*
4. **LIMITATION OF POWERS OF AGENTS.** — A condition in a policy of insurance that "it is further understood and made a part of this contract that the agent of this company has no authority to waive, modify, or strike out of this policy any of its printed conditions," does not have the effect of limiting the power of an agent of a company to make an agreement before the issuing of the policy, that it shall contain a condition permitting the building insured to remain vacant a specified length of time, without constituting a breach of the policy. The condition in question is merely a limitation upon the powers of the agent to waive or modify the terms of a policy after it has been issued. *Id.*
5. **WIFE'S INSURABLE INTEREST IN GOODS PURCHASED.** — A married woman may purchase goods on credit with the assent of her husband, or subject to his disaffirmance, and such contract to purchase creates a legal or equitable interest in the wife, which she may insure, provided she has a separate estate which she can charge by the contract to purchase. *Queen Ins. Co. v. Young*, 51.
6. **CONCEALMENT OF FACTS.** — If a married woman has an insurable interest in goods purchased by her on credit, her concealment of her coverture at the time of taking the policy is not a fact material to the risk, nor are her rights affected by private instructions to agents, uncommunicated to her, that they are not to issue insurance on stocks of merchandise in the hands of married women. *Id.*
7. **BREACH OF CONDITION — FORFEITURE.** — Procuring additional valid insurance, in violation of an express condition in the first policy, without

the written consent of the insurer, avoids the policy, unless the company has waived the right to insist upon such forfeiture. *Id.*

8. **CONDITIONS—FORFEITURE.**—Conditions in policy of insurance limiting or avoiding liability are strictly construed against the insurer, and liberally in favor of the assured. *Id.*
9. **WAIVER OF FORFEITURE** of policy of insurance, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel, and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture. *Id.*
10. **WAIVER OF FORFEITURE.**—Where an insurance company, after knowledge of the breach of a condition in the policy, enters into negotiations or transactions with the assured which recognize and treat the policy as still in force, and induces the assured to incur trouble or expense, it waives the right to insist upon a forfeiture. *Id.*
11. **BREACH OF CONDITION—FORFEITURE.**—The mere omission of an insurer to repudiate and annul a policy for breach of condition therein, and to notify the insured that it claimed the forfeiture, is not a legal waiver of the right to claim it if the insurer did not receive notice of the breach of condition until after the loss. *Id.*
12. **WAIVER OF FORFEITURE.**—The knowledge of the insurer of a breach of condition in the policy is necessary to a waiver of its forfeiture. Therefore a waiver does not arise from notice of such breach to an agent who is only authorized to solicit and take applications for insurance, receive premiums, and deliver policies, but who has no right to waive a breach of such condition, nor to settle a loss; nor does a waiver arise where the company's adjuster, with knowledge of such breach, agrees to select arbitrators to appraise the loss, but also stipulates that their appointment "is without reference to any other questions within the terms and conditions of the insurance contract as expressed in the policy," the latter providing that such appraisal "shall not determine the validity of the contract, nor the liability of this company, nor any other question except only the amount of such loss or damage." *Id.*
13. **SPECIAL AUTHORITY TO INSURANCE AGENT** to adjust a particular loss or damage does not confer authority to bind the company by a promise to pay such loss or damage. *Id.*
14. **ORAL AGREEMENT FOR INSURANCE IS BINDING ON COMPANY, WHEN.**—Where written application for insurance is made to and filed with the agents of the company, who orally agree to insure from the date of the application, provided the company is not already on the risk, there is a complete and valid contract binding from the date of the conversation, although the premium be not paid, if a usage of the business to extend a credit to the broker for the premium until the end of the month is shown *Ruggles v. American Central Ins. Co.*, 674.
15. **LIABILITY TO ASSESSMENT AFTER DESTRUCTION OF INSURED PROPERTY.**—Where the contract of insurance stipulates for the payment of assessments by the insured for all losses during the term of the policy, and provides for a surrender of the policy in case of the sale of the land, but no surrender is made, the liability to assessments continues during the term, and is not terminated by the destruction of the insured buildings by fire and the subsequent sale of the land. *Thropp v. Suquehanna Mut. F. Ins. Co.*, 909.

16. **CONSTRUCTION OF BY-LAW OF MUTUAL INSURANCE COMPANY, AND VALIDITY OF ASSESSMENTS MADE THEREUNDER.** — The by-law of a mutual insurance company which simply adds to the general rule of law, that losses shall be paid by the policies in force at the time of their occurrence, another provision, that if the assessment against such policies prove insufficient, then all existing policies, even though issued subsequently to the losses, shall be liable to make up the deficiency, is not unlawful, and assessments declared and levied on the basis thereof are regular and lawful. *Id.*
17. **EVIDENCE.** — Where action is brought by mutual insurance company to recover assessments on premium notes, and the evidence is that the assessments were made for losses only, it is matter irrelevant to the issue whether officers of the company improperly received compensation for their services, and testimony offered as to such compensation is properly refused. *Id.*
18. **ERROR FROM MISCALCULATION NOT DEFEATING RECOVERY.** — A recovery by the plaintiff in such action of the amounts really due will not be defeated by reason of a variance between the amounts of the assessments as stated in the notices to the defendant, and the amounts as proved at the trial, if the error arose from miscalculation merely. Mere errors of statements of amounts do not destroy the true claim. *Id.*
19. **SET-OFF AGAINST JUDGMENT RECOVERED ON POLICY.** — Refusal by court to allow mutual insurance company to set off its claims for interest and assessments due upon a policy-holder's premium notes against a judgment recovered on the policy by such holder for property destroyed is not an adjudication upon the claims as a cause of action, and will not bar a recovery in a subsequent action therefor. *Id.*
20. **RIGHT TO FUND AFTER ASSIGNMENT OF LIFE POLICY.** — A New York insurance company issued a policy upon the life of a citizen of Pennsylvania, payable to the wife of the insured, for her sole use, but providing that in case of her death before the decease of the insured, the amount of the insurance should be payable to her children. Both the insured and his wife joined in an assignment of the policy, and afterward the wife died, leaving the insured and seven children to survive her. After the death of the insured, the assignee of the policy, and the children of the deceased wife of the insured, made claim to the amount of the policy, and an interpleader was instituted by the company to determine the right to the fund. In such case, the contest being over a fund paid by the foreign corporation into the court of the common demioile of the claimants, its adjudication would depend upon the construction of the policy itself under which the parties claimed, and not upon the question whether the *lex fori* or the *lex loci* ought to prevail; and the wife's interest in the policy having been extinguished by her death in the lifetime of her husband, and her assignee being in no better position than she herself occupied at the time of the assignment, the amount of the insurance was payable to her children. *Brown's Appeal*, 900.
21. **CONDITIONS AS TO NOTICE AND PROOF OF LOSS.** — Stipulations in a fire insurance policy that the insured will forthwith give notice of loss, and render a particular and sworn account of such loss, accompanied with a magistrate's certificate thereof, are conditions precedent; and satisfactory evidence of compliance with them in proper time is an essential prerequisite to recovery, unless such compliance is waived by the insurer. *Central City Ins. Co. v. Oates*, 67.

22. **CONDITION AS TO NOTICE OF LOSS.** — Condition in a fire insurance policy that notice of loss must be given "forthwith" means that it must be given without unnecessary delay, or with reasonable diligence, under the circumstances of each particular case. Such condition is liberally construed in favor of the assured, and strictly against the insurer. *Id.*
23. **CONDITIONS — PROOF OF LOSS — WAIVER.** — Where a fire-insurance policy requires preliminary proofs of loss, and they are presented in due time, but are defective, such defects may be waived by the failure of the insurer to object to them on any ground within a reasonable time, or by putting his refusal to pay on any other specified ground than defect in proofs. *Id.*
24. **CONDITIONS — PROOF OF LOSS — WAIVER.** — Where a fire insurance policy requires preliminary proofs of loss, the mere silence of the insurer, or his failure to specify the non-production of such proof as an objection to the payment of the loss, cannot be construed as a waiver of the presentation of such proof, defective or otherwise. *Id.*
25. **PROOFS OF LOSS — WAIVER.** — Where a fire insurance policy exacts notice of loss forthwith, and proof of loss as soon thereafter as possible, mere notice of loss is not proof of loss, nor a waiver thereof, though proof of loss "forthwith" may answer also as notice. *Id.*
26. **PROOF OF LOSS — WAIVER.** — Where a fire insurance policy requires that notice of loss must be given forthwith, and proofs of loss as soon thereafter as possible, and it is shown that the insurer received notice of loss, but never received the proofs of loss sent, or knew their contents and defects, if any, it cannot be contended that such proof or defects are waived. *Id.*
27. **PROOF OF LOSS — WAIVER.** — Under a fire insurance policy requiring proofs of loss rendered at the residence of the insurer, the deposit in the post-office of a written statement of loss, sworn to and addressed to the insurer, but never received by him, is not a delivery of such proof so as to fulfill the requirements of the policy and constitute a waiver of such proofs. *Id.*
28. **GENERAL AGENT OF INSURANCE COMPANY MAY DELEGATE HIS POWER TO A CLERK, ASSISTANT, OR SUBAGENT** to the extent of authorizing the latter to agree that a policy to be issued shall contain a condition permitting the buildings insured to remain vacant for a period not exceeding thirty days without notice to the insurer. *Continental Ins. Co. v. Ruckman*, 121.
29. **A STATUTE MAY MAKE FOREIGN INSURANCE COMPANIES RESPONSIBLE FOR THE ACTS** of those who assume to aid them in the transaction of their business, and this is the effect of the statute of the state of Illinois declaring that "the term 'general agent' used in this section shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any way aid in transacting the insurance business of any insurance company not incorporated by the laws of this state." *Id.*
30. **REFORMATION OF POLICY.** — Where a clerk of a general agent of an insurance corporation agreed with an illiterate man to issue him a policy which should contain a condition that the buildings insured might remain vacant and unoccupied thirty days without notice to the insurer, and such clerk delivered a policy to the insured which he represented as containing the stipulation agreed upon, but which in fact contained a

condition that if the buildings insured became unoccupied without the consent of the company's indorsement thereon, the policy should become void, it was held, after a loss had occurred, that a suit might be maintained to reform the policy so as to conform it to the agreement made with the assured before its issuance, and that a recovery might be had in the same suit upon the policy as thus reformed. *Id.*

31. **CONSTRUCTION OF LIFE POLICY.** — Rules for interpreting the will of a testator may guide, as far as they are applicable, in ascertaining the legal effect of the clause in a life policy designating the beneficiaries. The difference in the cases consists in the fact that the interest vests under the policy at once upon its issue, but does not vest under the will until the death of the testator. *Hooker v. Sugg*, 717.
32. **POLICY OF LIFE INSURANCE CREATES VESTED INTEREST IN BENEFICIARIES DESIGNATED THEREIN**, and although the contract may be annulled by the company in case of the failure on the part of the insured to fulfill his contract stipulations, the insured himself is without the power of revocation, and the disposal of the fund, while the policy remains in force, is not under his control. *Id.*
33. IF "CHILDREN" BE DESIGNATED IN A LIFE POLICY AS BENEFICIARIES, the interest vesting at once is in such as then meet the description, and is not divested in favor of survivors by a death afterwards. *Id.*
34. **LIFE POLICY FOR BENEFIT OF WIFE AND CHILDREN — CONSTRUCTION.** — A life policy was issued, payable at the death of the insured to "his wife and children," without other designation. He surrendered this policy, and took a paid-up policy for the benefit of the beneficiaries, and also another policy in the same company, similar to the one surrendered, and for the benefit of "his wife and children," although when the last policy was issued his wife was dead. In such case, the last policy did not continue in force the one it superseded, and it should be construed in accordance with the then existing conditions, giving the entire fund to the surviving child and the administrator of the deceased one, the provision for the deceased wife being nugatory and unavailing. *Id.*
35. **CONSTITUTIONAL LAW.** — Provision in North Carolina constitution, article 10, section 7, which authorizes a husband to insure his life for the benefit of his wife and children, clearly looks to a provision for them, so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive. *Id.*

JUDGMENTS.

1. **JUDGMENT AGAINST A TENANT** cannot estop his landlord who was no party thereto. *Orthwein v. Thomas*, 159.
2. **A PRIVY TO A JUDGMENT OR DECREE IS ONE WHOSE SUCCESSION TO THE RIGHTS OF PROPERTY THEREBY AFFECTED OCCURRED** after the institution of the particular suit, and from a party thereto. *Id.*
3. **JUDGMENT IS RENDERED AT TIME COURT PRONOUNCES DECISION — NEED NOT BE IN WRITING OR SIGNED BY JUDGE.** — Judgment becomes rendered, and the rights of the parties established, at the time the court pronounces its decision; and it is not necessary to its validity that it should be in writing or signed by the judge. *Estate of Cook*, 267.
4. **JUDGMENT OF DIVORCE BECOMES EFFECTIVE AT TIME OF ITS RENDITION, AND NOT ENTRY.** — Judgment of divorce becomes effective at the time

of its rendition, although it is not entered by the clerk until a subsequent date. *Id.*

8. **JUDGMENT IS NOT RENDERED VOID BY MERE ABSENCE OF FINDINGS — FINDINGS NOT NECESSARY IN CASE OF DEFAULT.** — Judgment is not rendered void in any case by the mere absence of findings; and in case of default findings are not necessary, and form no part of the judgment roll. *Id.*
9. **JUDGMENT MAY BE ENTERED AFTER RENDITION AT REQUEST OF ANY ONE.** — Judgment may be entered after its rendition at the request of one not a party to the action. It is the duty of the court to have the judgment entered, no matter by whom its attention may be called to the matter. *Id.*
7. **NOTICE OF ENTRY NEED NOT BE GIVEN.** — Party against whom the judgment is rendered is not entitled to notice of its entry. *Id.*
8. **JUDGMENT OF DIVORCE MAY BE ENTERED AFTER DEATH OF PARTY.** — Judgment of divorce rendered in favor of a party during her lifetime may be entered after her death. *Id.*
9. **RULE PROTECTING JUDGMENT DEBTOR WHO HAS PAID JUDGMENT** to the former owner after it has been assigned, without notice of the assignment, extends only to those having the legal title, and does not extend to persons claiming to be beneficial owners. *Seymour v. Smith*, 683.
10. **TO MAKE PAYMENT OF JUDGMENT TO ONE NOT HAVING LEGAL TITLE THERETO EFFECTUAL**, the party paying must show that the person to whom the payment was made had, at the time, the right to receive payment. *Id.*
11. **DECREE RENDERED WITHOUT JURISDICTION CANNOT BIND OR RESTRICT ANY ONE**, and may be collaterally assailed, whenever and wherever it may be interposed, in any action. *Ferguson v. Jones*, 806.
12. **JUDGMENT OR DECREE OF A COURT HAVING JURISDICTION OF THE SUBJECT-MATTER AND OF THE PARTIES** is conclusive and binding on such parties and their privies, notwithstanding the court may have proceeded irregularly or erred in its application of the law in the case before it. *Maloney v. Dewey*, 131.
13. **CONTEMPT — COLLATERAL ATTACK ON HABEAS CORPUS.** — Attack by *habeas corpus* upon the judgment of a court committing the prisoner for contempt is subject to the rules applicable to collateral assaults upon judgments in other cases. *Ex parte Starnes*, 251.
14. **CONCLUSIVENESS OF RECORD ON COLLATERAL ATTACK.** — Record of a court, acting within its jurisdiction, must be considered as conclusively speaking the truth, until set aside or vacated in a direct proceeding. No evidence can be received to contradict it collaterally. *Id.*
15. **ADJUDICATION OF EXISTENCE OF FACT NECESSARY TO GIVE JURISDICTION — CONCLUSIVENESS ON COLLATERAL ATTACK.** — Judgment recorded is conclusive evidence of jurisdiction, until set aside or reversed in a direct proceeding, when the jurisdiction of the court depends on the existence of a litigated fact, which is adjudged to exist. *Id.*
16. **CONCLUSIVENESS OF ADJUDICATION IN COLLATERAL PROCEEDING AS TO DUE SERVICE OF PROCESS NECESSARY TO GIVE JURISDICTION.** — Adjudication by court that process necessary to give it jurisdiction was duly served is conclusive in a collateral proceeding. If the process, or the manner in which it was served, is irregular, the jurisdictional infirmity can be cured only by some proceeding in the court where the action is pending, or by appeal. *Id.*

17. **RECITAL OF JURISDICTIONAL FACTS—CONCLUSIVENESS ON COLLATERAL ATTACK.**—Judgment conclusively establishes existence of jurisdictional facts recited by it, so far as collateral proceedings are concerned; and no evidence *dehors* the record can be received to impeach them. *See parts A & M*, 263.
 18. **JUDGMENT LIEN DATES** as to property previously seized under attachment in the action from the time of the levy of the attachment, which is constructive notice from its date to subsequent purchasers from the attachment defendant; and it makes no difference that the property at the time of the levy was held by a third party under a fraudulent conveyance from such defendant. *McClellan v. Solomon*, 381.
 19. **JUDGMENT LIEN—PRIORITY.**—Where creditors having no lien file a bill set aside a fraudulent conveyance and obtain a decree, whereupon an undivided interest in the land thus conveyed is sold as the property of the fraudulent grantor, and afterwards the same interest is sold under judgment against such grantor, obtained after the first decree, but in which action an attachment had been levied prior to such decree, the purchaser's title at the judgment sale relates back to the levy of the attachment, and takes precedence of the purchaser's title at the sale under the decree or that of purchasers from him. *Id.*
 20. **JUDGMENT LIEN—NOTICE.**—A judgment is a lien on real estate which has been previously conveyed by an unrecorded deed, of which the judgment creditor did not have actual notice at the time that the judgment was entered. *Doyle v. Wade*, 334.
 21. **JUDGMENT LIEN—NOTICE.**—Where a judgment creditor has no notice, actual nor constructive, of a prior, unrecorded deed, his lien is complete, and a purchaser at a sale thereunder takes such title as the records show to be in the judgment defendant, without regard to whether the purchaser had notice or not. *Id.*
 22. **PURCHASER WITH NOTICE** from a purchaser without notice takes a good title. *Id.*
 23. **JUDGMENT LIEN.**—JUDGMENTS OF UNITED STATES COURTS are liens on any lands of defendant situate within the district over which the court has jurisdiction; and state statutes requiring judgments to be recorded in the county in which the land lies have no effect upon the lien of a judgment of a United States court. *Id.*
- See** AGENCY, 9; CONTEMPT, 6, 13; COURTS, 2; JUDGMENT, 13, 23; JUDICIAL SALES, 4; HUSBAND AND WIFE, 4; INSANE PERSONS, 2, 3; JURISDICTION, 2; LIMITATION OF ACTIONS, 3; MASTER AND SERVANT, 4, 5; NUISANCES; SET-OFF.

JUDICIAL SALES.

1. **PURCHASER AT SHERIFF'S SALE ACQUIRES INCHOATE TITLE** in the land purchased by virtue of his bid and its acceptance by the sheriff; and the subsequent acknowledgment and delivery of the deed provides the purchaser with the evidence of his title, which relates to and takes effect as of the date of the sale recited in it. *Pennsylvania etc. R. R. Co. v. Cleary*, 913.
2. **MISTAKE IN RECORD—COLLATERAL ATTACK.**—When the inspection of the entire record in proceedings for the sale of a decedent's land discloses the nature and extent of a clerical error therein, such record will correct itself, and the court will treat it as corrected when

the validity of the proceedings is collaterally attacked. *Goodwin v. Sims*, 21.

2. JURISDICTION. — When a court of limited jurisdiction by the recitals in its decree ascertains a jurisdictional fact, such adjudication is final and conclusive when the decree is collaterally assailed; and when the decree is silent, such jurisdictional fact may appear from the other parts of the record. *Id.*
4. RECITALS IN DECREE CONCLUSIVE. — Where a decree of sale of a decedent's lands declares that depositions of witnesses were taken upon interrogatories as to the necessity of the sale of infant's interests therein, and were submitted by the petitioner, and ordered to be filed of record, it will be conclusively presumed on collateral attack that such depositions on which the court acted were taken as in chancery proceedings as required by statute. *Id.*

JURISDICTION.

1. PRESUMPTION. — Where it affirmatively appears that adverse party to decree was non-resident of the state at the time the decree was rendered, and the record is silent as to his appearance or notice, there can be no presumption that jurisdiction over his person was acquired by such court. *Ferguson v. Jones*, 808.
 2. VALIDITY OF JUDGMENT. — It is a rule as old as the law that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. *Id.*
 3. SPECIAL AND SUMMARY POWERS. — A court of general jurisdiction may have special and summary powers, wholly derived from statute, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction, and in such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. *Id.*
 4. JURISDICTION OF A COURT OF THE UNITED STATES IS NOT DIVESTED by the fact that it erroneously directs a sale without allowing the right of redemption therefrom. If relief can be obtained from such decree, it must be by application of the court which entered it. *Maloney v. Dewey*, 131.
 5. ENTIRE RECORD OF COURT imports absolute verity, and the recitals in a decree may be explained, limited, or qualified by other parts of the record, and it may be looked to to ascertain the jurisdictional facts when there is no finding by the court; but when the power to ascertain the jurisdictional facts is conferred on the court, and it adjudges jurisdiction in itself, that is not overcome on collateral attack, because other parts of the record may not uphold such finding. The falsity of such finding must be affirmatively proved. *Goodwin v. Sims*, 21.
- See JUDICIAL SALES, 3; JUDGMENTS, 11, 12, 16, 17; COURTS, 1, 2.

LACHES.

See ABATEMENT; EQUITY, 1, 3, 4; SPECIFIC PERFORMANCE.

LANDLORD AND TENANT.

1. LANDLORD ASSUMING TO OPERATE ELEVATOR FOR BENEFIT OF HIS TENANTS IS BOUND TO EXERCISE DUE CARE for their safety, and is liable to them

- for the negligence of his employees in operating the elevator. *Toussy v. Roberts*, 655.
2. **ELEVATOR FOR CARRIAGE OF PERSONS IS NOT SUPPOSED TO BE PLACE OF DANGER**, to be approached with great caution, but may be assumed to be, when the door is thrown open by an attendant, a place that may be safely entered without stopping to look, listen, or make a special examination. *Id.*
 3. **WHETHER OWNER OF BUILDING SHOULD NOT HAVE EXERCISED SUCH SUPERVISION OVER IT** as to make it impossible for a young boy, who was not his servant, to do acts from which the tenants of the building might have derived the impression that the boy was his servant, and was in fact an attendant at the elevator therein, is properly left by the court to the jury to determine as a question of fact. *Id.*

LARCENY.

See CRIMINAL LAW, 36-39; MALICIOUS PROSECUTION, 2.

LEGISLATURE.

1. **COMPENSATION OF EMPLOYEES — MEANING OF WORD "DAY."**—Compensation of the porters of the senate of California is fixed at four dollars per day by section 268 of the Political Code; and the word "day," as used in the section, covers whatever portion of the twenty-four hours the senate chooses to remain in session. *Robinson v. Dunn*, 297.
2. **GIFTS TO EMPLOYEES — COMPENSATION AFTER SERVICE RENDERED.** — Legislature of California has no power, under the state constitution, to make gifts to its employees, or to allow them extra compensation after service rendered. *Id.*

LIENS.

See JUDGMENTS, 18-23; LIES PENDENS, 6.

LIMITATION OF ACTIONS.

1. **REVERSIONERS AND STATUTE OF LIMITATIONS. — CHILDREN INHERITING FROM THEIR MOTHER** real estate of which their father is tenant by the curtesy are not entitled to possession until after his death, and the statute of limitations cannot run against them in his lifetime. *Orthwein v. Thomas*, 159.
2. **STATUTE OF LIMITATIONS** does not begin to run against a breach of promise to make a will until the promisor's death, because until then no right of action could accrue. *Manning v. Pippen*, 46.
3. **CONFLICT OF LAWS.** — In the absence of proof of a statute of a foreign state, putting a judgment obtained there before a justice of the peace upon the same footing with ordinary simple contract debts as to the statute of limitations, the law of such foreign state will be presumed to be the same as that of Pennsylvania, and an action in the latter state on the transcript of the judgment will not be barred at the end of six years from the entry of judgment. *Evans v. Cleary*, 886.
4. **WHEN STATUTE OF LIMITATIONS** has once commenced to run, no subsequent disabilities can check or impede it. *Doyle v. Wade*, 334.

See ADVERSE POSSESSION, 4-6; BOUNDARIES, 2.

LIS PENDENS.

1. **PURPOSE OF DOCTRINE OF.** — Strictly speaking, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. The main purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations pending the litigation, its judgment or decree could be rendered abortive, and impossible of execution. *Houston v. Timmerman*, 848.
2. **TENDENCY IN SOME COURTS IS TO RESTRICT APPLICATION OF RULE OF LIS PENDENS** to actions or suits affecting title to real property, but it is hardly considered well settled that it may not with equal propriety be applied to the sales of chattels. *Id.*
3. **GENERAL RULE OF.** — One who purchases of either party to the suit the subject-matter of the litigation after the court has acquired jurisdiction is bound by the judgment or decree, whether he purchased for a valuable consideration or not, or without any express or implied notice in point of fact. *Id.*
4. **TO GIVE EFFECT TO RULE OF LIS PENDENS**, two things seem indispensable: 1. That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit must be so clearly designated that any one may learn from the description what property was intended to be affected by the litigation. *Id.*
5. **PURCHASER, PENDENTE LITE, OF SUBJECT OF LITIGATION IS NOT AFFECTED BY SUIT** pending, or by the notice of its pendency, unless the suit has been prosecuted with due diligence, if he buys in good faith, and without actual notice of the claims of the litigants. *Hayes v. Nourse*, 700.
6. **PENDENCY OF ACTION, OR RECORDED NOTICE THEREOF, DOES NOT MAKE TITLE DEFECTIVE.** — Neither a pending action brought to establish title to or a lien upon land, nor a duly recorded notice of its pendency, of itself, makes the title defective, or creates a lien on the land. *Id.*

See MARRIAGE AND DIVORCE, 3, 4.

MALICIOUS PROSECUTION.

1. **PROOF OF RECORD.** — The original papers and docket in criminal proceedings before a justice of the peace are not self-proving, and to be admissible in an action for malicious prosecution, they must be identified and authenticated either by sworn copy or by the certificate of the magistrate. *Lunsford v. Dietrich*, 37.
2. **INFORMATION.** — In an action for malicious prosecution under article 273, Penal Code of Texas, it is not necessary to allege in the information that the alleged malicious prosecution had ended before the information was presented. *Dempsey v. State*, 193.
3. **MALICE.** — To convict for malicious prosecution, the prosecution alleged to have been malicious must be proved to have been actuated by malice. *Id.*
4. **LEGAL MALICE** is an unlawful act done willfully and purposely to the injury of another. *Id.*
5. **MALICE — PROBABLE CAUSE.** — To convict for malicious prosecution, it must be proved that there was legal malice actuating the wrong done, and also want of probable cause for instituting the alleged malicious prosecution; and though it was actuated by malice, still defendant can-

- not be convicted if the proof shows that he had probable cause for instituting the prosecution. *Id.*
6. **PROBABLE CAUSE** is the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted. *Id.*
 7. **EVIDENCE**. — In criminal malicious prosecution based upon a discharge from a criminal charge, the evidence of the justice before whom the first trial was had, that the evidence there was not sufficient to sustain the charge, is inadmissible, and calculated to injure defendant. *Id.*
 8. **PROBABLE CAUSE**. — In support of the issue of probable cause *vel non*, in an action for malicious prosecution for larceny, the plaintiff may prove that the property alleged to have been stolen was his, and the prosecutor's knowledge of the fact. *Lumsford v. Dietrich*, 37.
 9. **PROBABLE CAUSE**. — An architect who has been prosecuted for the larceny of the drawings of a building by the builder, and acquitted, and who sues the builder for malicious prosecution, may prove, upon the issue of probable cause *vel non*, — a universal custom, — that such drawings remain the property of the architect, and that the builder is only entitled to the use of them during the time of construction, to be returned when the building is completed; and also that such builder had erected buildings by plans and specifications drawn by architects, in order to trace knowledge of such custom to him. *Id.*
 10. **MALICE — PROBABLE CAUSE**. — To maintain malicious prosecution, malice and want of probable cause must occur; and though malice may be inferred from want of probable cause, still such inference may be rebutted by proof that the prosecutor, though not able to show probable cause, instituted the prosecution under an honest belief of plaintiff's guilt; provided such belief was founded on facts and circumstances sufficient to produce in the mind of a prudent and reasonable man such belief of plaintiff's guilt as to repel the idea that the prosecutor was actuated by malice. *Id.*
 11. **DAMAGES**. — In malicious prosecution for larceny, the court may instruct the jury that plaintiff, if entitled to recover at all, can recover such actual damage as naturally and proximately followed the arrest, as physical suffering and wounded pride; but that a witness could not testify to the particular amount of such damage, — that to be determined by the particular circumstances of the case. *Id.*
 12. **TO SUSTAIN ACTION FOR MALICIOUS PROSECUTION**, there must be a concurrence of malice and want of probable cause. *Coleman v. Allen*, 449.
 13. **PROBABLE CAUSE**. — The provision of the code of Georgia declaring that "want of probable cause shall be a question for the jury, under the direction of the court, and shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused," does not limit want of probable cause to cases where the accuser had no ground for proceeding but the desire to injure the accused. The accuser may still be guilty of proceeding without proper cause, though his motive is wholly free from any independent wish to injure the accused. *Id.*
 14. **INSTRUCTION**. — It is an error to instruct the jury, in determining whether the defendant had acted without probable cause, to consider whether he acted "as you would act under the same circumstances." *Id.*

- 25. THAT THE MOTIVE OF THE PROSECUTOR** was to make an example of the accused, and thereby to deter others from committing crime, does not render the former guilty of malicious prosecution, if he had reasonable cause to believe the latter to be guilty of the crime charged. *Id.*
- 26. INSTRUCTION IN AN ACTION FOR MALICIOUS PROSECUTION**, that "in cases of this character, the injury, if any is proved to your satisfaction, is to the peace, happiness, etc., of the plaintiff; no measure of damages can be prescribed except the enlightened conscience of impartial jurors," is correct, if confined to that part of the case wherein there can be no exact measure of damages, but it should be so limited that the jury will not apply it to that part of the case where the exact amount of damages has been proved, such as expenses in counsel fees, loss of time, and the like. *Id.*
- 27. ELEMENTS OF DAMAGES.**—The pecuniary circumstances of the defendant may be considered by the jury in an action of malicious prosecution under the code of Georgia, which declares that "the injury shall not be confined to actual damages sustained by the accused." *Id.*

MANDAMUS.

See ELECTIONS, 28.

MARKETS.

See COMMERCE, 1, 2; EVIDENCE, 5-10.

MARRIAGE AND DIVORCE.

- 1. NATURE OF SUIT FOR DIVORCE, AND EFFECT OF DECREE THEREIN.**—In a suit for divorce, the land which goes to the wife as the result of the divorce is not the subject-matter of the litigation, and the court has no jurisdiction to affect or divest the title of the husband to his lands, or to decree that one third of them shall be set apart to the wife, independent of a decree for divorce. Nor has the plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for divorce. *Houston v. Timmerman*, 848.
- 2. TEMPORARY ALIMONY MAY BE GRANTED PENDENTE LITE**, but the title of the real estate of the defendant remains intact, and cannot be affected during the pendency of the litigation, but only when a decree has been rendered that the marriage is dissolved, and then only by force of the statute. *Id.*
- 3. EFFECT OF DECREE OF DIVORCE ON REAL PROPERTY.**—Under provisions of Oregon Code, section 499, it is "whenever a marriage shall be declared dissolved" that the statute operates, — not before, or *pendente lite*, — and the court then becomes authorized, and it is its "duty," "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "owned by the defendant at the time of such decree" for a divorce. *Id.*
- 4. DECREE IN DIVORCE SUIT — LIT PENDENS.**—Although the prosecution of a divorce suit might result in a decree which would affect the real property of the defendant, yet such property is not the subject specifically of the litigation, and by reason thereof is not withdrawn from such burdens as might be legally imposed upon it for just claims upon judgments recovered and docketed against its owner

prior to divesting him of his title by force of the statute under the decree for divorce, and a purchaser of such lands at an execution sale upon such judgment is not affected by or subject to the rule of *lis pendens*. *Id.*

5. DECREE IN DIVORCE — DESCRIPTION OF PROPERTY AFFECTED. — In a suit for divorce, it has been deemed essential, in order to reach the property of the guilty party, that such property should be described in the complaint and decree, but it is apprehended that this is unnecessary, and that it is a sufficient compliance with section 499 of the Oregon Code to say, in effect, that the party obtaining the divorce is hereby entitled to one third of the real property owned by the other, whatever it may be; and if any question arises as to what property was so owned, it can be determined by appropriate proceedings for that purpose between the parties interested. *Id.*

See STATUTE OF FRAUDS, 2; HUSBAND AND WIFE.

MARRIED WOMEN.

1. ACKNOWLEDGMENT REQUIRED TO LEASE EXECUTED BY MARRIED WOMAN — ACCEPTANCE OF RENT WILL NOT VALIDATE INSTRUMENT. — Lease executed by a married woman must be acknowledged, in California, in order to be valid; and the fact that she accepts rent does not validate an unacknowledged lease, but at most creates a tenancy terminable by proper notice. *Carlton v. Williams*, 243.
2. ACKNOWLEDGMENT OF MARRIED WOMAN TO DEED REFERRING TO ANOTHER INSTRUMENT — DUTY OF NOTARY. — Notary who takes the acknowledgment of a married woman to a deed which refers to another instrument not before him, for the conditions upon which the property is conveyed, is not required to make her acquainted with the contents of such instrument, but does his whole duty if he makes her acquainted with the contents of the deed. *Bull v. Coe*, 235.
3. MARRIED WOMAN DELIVERING DEED TO HUSBAND TO ENABLE HIM TO BORROW MONEY — EXTENT OF HUSBAND'S AUTHORITY. — Married woman who executes a deed of her property, and delivers it to her husband for the purpose of enabling him to borrow money from the grantee without limiting him to any particular amount, thereby authorizes her husband to deliver the deed to the grantee for such an amount as he may see fit. *Id.*
4. MARRIED WOMAN WHO MORTGAGES HER SEPARATE PROPERTY TO SECURE LOAN TO HER HUSBAND IS SURETY, and not a principal debtor, notwithstanding her general interest as a wife in her husband's transactions. *Id.*
5. FOREIGN ATTACHMENT. — PENNSYLVANIA ACT OF 1848, SECURING TO MARRIED WOMEN the ownership and enjoyment of their separate property, but subjecting it to seizure for debts contracted by them for necessities after marriage, is comprehensive enough in its provisions to embrace legacies and distributive shares due to married women, and subject them to seizure by foreign attachment. *Evans v. Cleary*, 886.
6. CONFLICT OF LAWS. — WHERE JUDGMENT IS RECOVERED AGAINST MARRIED WOMAN IN ACTION ON CONTRACT made by her in a state under the laws of which a recovery may be had thereon against her alone, without her husband being joined, such judgment may be enforced in a proceeding against her in Pennsylvania, without joining the husband as a co-defendant, although at the time the proceeding was

instituted such joinder was necessary under the laws of the latter state. In all matters relating to the remedy merely, the *lex fori* prevails, but the liability of a party to a contract depends on the *lex loci contractus*. *Id.*

See INSURANCE, 5, 6; MORTGAGES, 9; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. **NEGLIGENCE.** — Where a foreman has the whole charge of the erection and construction of a building, and exercises full control over it in the place of his employer, the negligence of the foreman is the negligence of the employer, who is liable therefor, whether he knew that the foreman was careless or incompetent or not, provided the workman injured was not in fault, but used due care and caution. *Slater v. Chapman*, 593.
2. **NEGLIGENCE — DUTY OF RAILROAD COMPANY TO EMPLOYEES.** — A rule of a railway company requiring all car-inspectors and repair-men, before they go under or between any cars to inspect or repair them, to first display a red signal on the end of a car or cars in the direction from which a train or engine could approach, requiring them to provide themselves with such signals, obtained from their foreman, and to have them on hand at all times for use, and also requiring that all train-men must carefully observe such rule, and under no circumstance back against or couple onto any car while such signal is displayed, — is adequately sufficient, if enforced, for the protection of car-inspectors and repair-men, and relieves the company of negligence in not having a watchman or "bumpers," and in running other cars upon the same track, where cars were being repaired, when space was left between them, and the red signal was respected according to the rule. *Peterson v. Chicago etc. Ry Co.*, 564.
3. **NEGLIGENCE OF FELLOW-EMPLOYEES.** — An employer is not liable for the negligence of fellow-employees, in the absence of proof that the latter are incompetent in such sense as to charge the employer with the results of their negligence. *Id.*
4. **FELLOW-EMPLOYEES.** — A railroad-foreman, a railroad-yard boss, and an engineer of a switch-engine are fellow-employees. *Id.*
5. **NEGLIGENCE IN EMPLOYING FOREMAN ADDICTED TO EXCESSIVE USE OF INTOXICATING LIQUOR.** — It is negligence and want of ordinary care for a manufacturing company to place men who are accustomed to the habitual use to excess of intoxicating liquor in charge of business requiring the control and direction of persons operating dangerous machinery; and for any injury to the employed under the charge of an intoxicated foreman, resulting from such cause, when the company has knowledge of such intemperate habits, it must make reasonable compensation. *Kean v. Detroit etc. Rolling Mills*, 492.
6. **EVIDENCE OF INTEMPERATE HABITS OF FOREMAN IS ADMISSIBLE** in an action to recover damages for an injury received by an employee under such foreman while engaged in wiping dangerous machinery under the orders of the latter. *Id.*
7. **WHERE FOREMAN AND HIS ASSISTANT HAVE EQUAL KNOWLEDGE OF DANGER** accompanying an act about to be done, even if the foreman requests its performance, and injury ensues to the assistant, the employer cannot be made liable. Notwithstanding the request in such case made by the foreman, the assistant can comply or not as he chooses, and if he does comply, he takes his chances of the perils surrounding the situation;

- and in such a case, where there is no dispute upon the facts, there is no occasion to go to the jury to determine whether the assistant ought to have obeyed the order of the foreman or not. *Id.*
8. **SERVANT ASSUMES NOT ONLY USUAL AND ORDINARY RISKS AND PERILS** of his master's service when he enters it, but also such other risks as become apparent by ordinary observation. *Id.*
 9. **DAMAGES FOR PROCURING DISCHARGE OF SERVANT.** — An employee may maintain an action for damages against a third party maliciously procuring his employer to discharge him from employment under a legal contract for a certain period pending such period, provided damages result to the employee from his discharge; and under the same circumstances the action may be maintained, though the employment is not for a fixed period. *Chipley v. Atkinson*, 367.
 10. **DAMAGES FOR PROCURING DISCHARGE OF SERVANT.** — Though no contract exists between the master and servant, and no legal right as between them is violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge. *Id.*
 11. **DAMAGES FOR PROCURING DISCHARGE OF SERVANT.** — An unsuccessful, but malicious, attempt to procure the discharge of an employee by a third person will not support an action against him for damages. To support such action, an actual discharge is necessary. *Id.*
 12. Where, in an action by a servant to recover damages against a third person for maliciously procuring his discharge, the declaration alleges that there was a contract for his employment for a long period of time, it is erroneous to charge that plaintiff can recover, though there was no contract for a definite term of service. *Id.*
 13. **DAMAGES FOR MALICIOUS DISCHARGE.** — In an action by a servant against a third person for maliciously procuring his discharge, the absence from the agreement of employment of a clause fixing the wages at a certain or stipulated amount will not defeat a recovery of damages, so long as the value of such compensation can be ascertained. *Id.*
 14. **DAMAGES FOR PROCURING DISCHARGE OF SERVANT.** — In an action for damages against a third person for procuring the discharge of a servant, if it appears that the latter left the service voluntarily, owing to the unsuccessful, but malicious, attempts of such third party to have him discharged, he cannot recover. An actual discharge is necessary to a recovery. *Id.*
 15. **DAMAGES FOR PROCURING DISCHARGE OF SERVANT.** — In an action by an employee against a third person for maliciously procuring his discharge, the speculative profits or probable damage resulting to the employee from a proposed partnership with the employer is entirely too uncertain to be estimated as an element of actual or compensatory damages sustained by the employee. Where, however, the third party knew or believed, or had reason to believe, that the employer had promised or did actually intend to admit the employee into partnership, the fact of such knowledge or belief may be considered by the jury in passing upon the motive of the third party, and in fixing exemplary damages. *Id.*
 16. **DAMAGES FOR PROCURING DISCHARGE OF SERVANT.** — In an action by an employee against a third person for maliciously procuring his discharge, the fact that such third person withheld a gratuity from or broke his contract with the employer, because the latter retains the employee in his service or with an interest in his business, does not give

the employee a right of action. There is no privity nor any legal right violated between the third person and the employee; nor is such withholding or breach of contract proof of procurement of discharge, but may be used as proof to show the malicious attempt of the third person to persuade the employer to discharge the employee. *Id.*

17. **INJURY FROM DEFECTIVE APPLIANCE — NEGLIGENCE QUESTION FOR JURY.** — In an action to recover damages for an injury from a knife flying out of a shaper-head, if the proof shows that it was the first time the shaper was used; that the injury happened as soon as it reached its highest velocity, before it was applied to cutting timber; that such shaper-head was contrived, invented, and made upon a plan of one of the principal managers of the employer; that it was novel, and differed in some respects from other heads in use, and especially in the device used to check the tendency of the knife to fly out of its socket, — this evidence, together with the fact that the knife did fly out when fastened as well as it was designed to be, has a tendency to prove that the design was bad, and is at least enough to go to the jury on the question whether it was a reasonably safe implement, and properly designed, and whether the principle it involved was not a departure from safe methods as before applied; and the fact that there may have been some conflict on one or another question does not authorize the trial judge to deprive the jury of power to determine such conflict. *Marshall v. Widdicomb Furniture Co.*, 573.

18. **DANGEROUS MACHINERY.** — Persons using machinery are not held to any absolute duty of insuring its safety, but some care is required in introducing untried novelties. That which has been approved as safe by reasonable experience may be presumed safe by those who rely on that experience to justify them in selecting it; and where the result of any defect must be an immediate danger to human life, it devolves on those who expose life to the dangers of a new experiment which turns out badly to show that they have followed such a course as the understood rules of service or mechanics applicable to such matters rendered safe according to ordinary probabilities. *Id.*

19. **MEASURE OF DAMAGES FOR INJURY TO EMPLOYEE.** — Section 2591, Alabama Code, authorizing the personal representative to maintain an action where an injury through the negligence of the master results in the death of an employee, does not provide for punitive or vindictive damages, in the absence of proof of willful, wanton, or reckless negligence on the part of the master, but pecuniary gain from continuance of life constitutes an element of damages in such cases, and evidence that the party injured was afflicted with a pneumonic complaint which affected the probable continuance of his life should be admitted. *Columbus etc. Ry Co. v. Bridges*, 58.

See CRIMINAL LAW, 36; NEGLIGENCE, 6; RAILWAY COMPANIES, 17, 18, 25.

MINES AND MINING.

- I. **MINING CLAIM — VERBAL AGREEMENT TO LOCATE — STATUTE OF FRAUDS — TRUST.** — Agreement to locate a mining claim for the joint benefit of the parties need not be in writing under the statute of frauds; and if, in pursuance of a verbal agreement to that effect, one of the parties locates the claim in his own name, he will hold the legal title to the interest of the other in trust for him. *Morris v. Lovell*, 229.

AM. ST. REP., VOL. XI. — 68

2. **MINING CLAIM — ACTION TO ENFORCE TRUST — CITIZENSHIP NEED NOT BE ALLEGED.** — Plaintiff need not allege citizenship in his complaint, in an action to enforce a trust in a mining claim located by the defendant in his own name for the joint benefit of both parties. *Id.*
3. **PLEADING — ALLEGATION OF PERFORMANCE OF CONDITIONS ON PART OF PLAINTIFF.** — Performance of conditions on the part of the plaintiff is sufficiently alleged in an action to enforce a trust in a mining claim under a verbal agreement between the parties, where the complaint states "that plaintiff has performed all and singular his agreements and covenants with defendant." *Id.*

MISTAKE.

See ADVERSE POSSESSION, 1; CONTRACTS, 2; DEEDS, 2; EVIDENCE, 18; INSURANCE, 29; JUDICIAL SALES, 2; NEGOTIABLE INSTRUMENTS, 3; SALES, 4, 5.

MORTGAGES.

1. **HOMESTEAD — REFORMATION.** — A homestead mortgage executed by husband and wife in conformity with the Alabama statute (Code, section 2822) may be reformed in equity for mistake in describing one of the subdivisions of land, if the quantity of land conveyed is not thereby increased. *Witherington v. Mason*, 41.
2. **FUTURE ADVANCES — PAYMENT.** — When a mortgage is executed to secure an existing debt, and does not contemplate or provide for future advances, any money realized from the mortgaged property must be applied to the payment of the debt secured. *Id.*
3. **APPLICATION OF PAYMENTS.** — Where a mortgage conveys different parcels of the same kind, or different classes of property, the mortgagee may, in the absence of a stipulation to the contrary, elect for his own benefit the particular property to which he will resort in the first instance, and in the absence of some peculiar equity growing out of other circumstances, the mortgagor, or any person claiming under him, cannot compel the mortgagee to exhaust any one of the different parcels or classes of property conveyed by the mortgage to the exclusion of the other. *Id.*
4. **HOMESTEAD — APPLICATION OF PAYMENTS.** — Where the wife voluntarily signs and assents to a mortgage of the homestead and other personal property by the husband to secure advances, the homestead loses its character as against the mortgagee, and becomes subject to all his rights and remedies, and the wife has no right to insist that the personal property be first sold and applied in relief of the homestead, especially when the husband has secured additional advances on an agreement that the proceeds of the sale of the personal property should be first applied to the payment of such additional advances. *Id.*
5. **HOMESTEAD — RIGHT OF WIFE.** — By signing and assenting voluntarily to a mortgage of the homestead and other personal property as required by statute, the wife does not pledge her property for the payment of the secured debt; nor does she occupy the position of a surety so as to invoke the power of a court of equity to compel a mortgagee to exhaust one of the several pieces of property before resorting to the others. *Id.*
6. **MORTGAGE TO SECURE FUTURE ADVANCES — PRIORITY OVER SUBSEQUENT ENCUMBRANCES BY MECHANICS' LIENS OR OTHERWISE.** — Mortgage made in good faith to cover future advances of money or goods is valid, if prop-

erly recorded, as against subsequent encumbrancers by mechanics' liens or otherwise, except as to advances made after actual, as distinguished from record, notice of a subsequent encumbrance, although the mortgage does not disclose upon its face that it was given in part for future advances, if the amount of liability is expressly limited, and although the agreement for advances be not in writing. *Tapia v. Demartini*, 288.

7. **PAROL TRUST IN MORTGAGE IS VALID — EVIDENCE OF TRUST IS ADMISSIBLE AS NOT VARYING WRITING.** — Parol agreement that a mortgage shall be held in trust by the mortgagee, in part for his own benefit and in part for the benefit of another, is valid in California, a mortgage conveying no estate in, but creating a mere lien upon, the land; and evidence of such agreement does not vary the terms of the written instrument. *Id.*
8. **FORECLOSURE — OUTSTANDING TITLE — BREACH OF COVENANT.** — Where a mortgagor is in the undisturbed possession of the land under a deed of conveyance, with full covenants of warranty, and no eviction, actual or constructive, is shown, and no insolvency of, or fraud or misrepresentation upon the part of, the vendor is alleged, the mortgagor cannot set up an outstanding title, or the breach of covenants, as a defense to a bill to foreclose for the unpaid purchase-money. The mortgagor's remedy is at law on the broken covenant. *Randall v. Bourguier*, 379.
9. **FORECLOSURE. — DECREE AGAINST FEME COVERT,** in an ordinary foreclosure suit, for the payment of any balance which may remain due after an application of the proceeds from the sale of the mortgaged land is a personal decree, and void. *Id.*
10. **MORTGAGEE'S RIGHT TO FORECLOSE AS TO ONE OF SEVERAL PIECES OF PROPERTY MORTGAGED — WAIVER OF OMITTED SECURITY.** — Mortgagee whose loan is secured by mortgage on several pieces of property may foreclose as to one of such pieces, thereby waiving his security upon the omitted portions, if he does not seek a personal judgment against the mortgagor. *Bull v. Coe*, 235.

See CRIMINAL LAW, 67, 68; FRAUD, 4; HOMESTEAD.

MUNICIPAL CORPORATIONS.

1. **CONTRACTOR — LIABILITY OF CITY FOR NEGLECT OF.** — A city is answerable to a person suffering injury from the negligent act of its contractor, if the contract required the performance of work which was intrinsically dangerous, however successfully done, or if the city was under a primary obligation to keep the subject-matter of the work in a safe condition. *Village of Jefferson v. Chapman*, 136.
2. **ONE UPON WHOM A DUTY IS IMPOSED CANNOT AVOID HIS RESPONSIBILITY** for its faithful performance by contracting with another for such performance. *Id.*
3. **DUTY OF MAINTAINING ITS STREETS IN A SAFE CONDITION** for public travel rests primarily on the municipal corporation, and this duty continues, though a contract is made by it for the doing of work on such streets, and it has no immediate control over the contractor or his work. Therefore, a person injured by a defect in such streets, occasioned by the negligent act of such contractor, may recover therefor from the city. *Id.*
4. **PRESUMPTION. — WHEN WORK IS DONE ON THE STREETS OF A CITY OR VILLAGE** it is presumed that it was done by the authority of such city or village. *Id.*

5. MUNICIPAL CORPORATION CAUSING WORK TO BE DONE WHICH IN ITS NATURE IS DANGEROUS to the public must take notice of the character of the work, and the condition in which it was left, whether safe or dangerous. *Id.*

See NEGLIGENCE, 9.

NEGLIGENCE.

1. DEFECTIVE PREMISES — INJURY TO LICENSEE. — A person lawfully driving upon the premises of another is bound to leave them by the usual, ordinary, and customary way in which such premises are and have been departed from, provided the same are safe, free from defects, and in good condition; and if, for his own convenience, or some other reason, he departs from such way, and takes another, he becomes, at best, a mere licensee, and cannot recover for injuries from a defect in the latter way, unless it was substantially adjacent to the former way, and a distance of twenty-five feet is not so adjacent. *Armstrong v. Medbury*, 585.
2. CONDITION OF PREMISES — DUTY OF OWNER — LICENSEE. — A manufacturer cannot reasonably suppose that his premises will be used, as to ingress and egress, in any other manner than the usual, ordinary, and customary way, well defined from constant use; nor must he render his premises safe, by fencing or otherwise, for any purpose for which he cannot reasonably anticipate they will be used. *Id.*
3. MANUFACTURER — DUTY AS TO PREMISES. — A manufacturer must be allowed to use his premises for his business purposes in such manner as he may choose, so long as they are not rendered dangerous to the ordinary use of the public doing business with him, or dangerous to his employees. *Id.*
4. ACTIONABLE NEGLIGENCE EXISTS FROM OMISSION TO PERFORM DUTY OF OBSERVING DUE CARE, according to the circumstances, to prevent injury to the person or property of one who has the right to expect the duty will be performed. But the owner of a vessel laid up for the winter is not guilty of such negligence in leaving the hatchways open and unprotected; and persons walking on the decks, under such circumstances, are chargeable with notice of the probable presence of such open hatchways. *Cuniff v. Blanchard Nav. Co.*, 541.
5. FAILURE OF SHIP-KEEPER TO WARN PERSON OF OPEN HATCHWAY, IF NEGLIGENCE, CANNOT BE IMPUTED to the owner of the vessel, where the ship-keeper invites the person on board, contrary to the orders of the owner. *Id.*
6. MATE OF VESSEL INJURED THROUGH NEGLIGENCE OF MASTER CANNOT RECOVER in an action against the owner. The negligence is that of a fellow-servant. *Id.*
7. RULE REQUIRING OCCUPIER OF PREMISES, AS TO PERSONS THEREON BY HIS INVITATION, express or implied, to keep them free from danger, or to warn of danger known to him and unknown to the visitor, has no application to a case where a person who, from his experience through many years in a sailing-vessel, knows that it is customary to leave the hatchways of vessels open while lying in port, and that they are sources of danger which he must avoid at his peril. *Id.*
8. JURY TRIAL. — WHETHER A PARTY WAS IN THE EXERCISE OF ORDINARY CARE in a particular case is a question of fact for a jury. *Village of Jefferson v. Chapman*, 136.

9. **EVIDENCE.** — IN AN ACTION AGAINST A MUNICIPAL CORPORATION FOR INJURIES SUFFERED FROM A DEFECT IN THE STREET, evidence may properly be received that there were no street-lamps at the crossing where the accident occurred. *Id.*
10. **NONSUIT.** — NEGLIGENCE IS ORDINARILY QUESTION OF FACT FOR JURY TO DETERMINE, from all the circumstances of the case; and the cases where a nonsuit is allowed are exceptional, and confined to those where the uncontradicted facts show the omission of acts which the law adjudges negligent. *Durbin v. Oregon etc. Co.*, 778.
11. **THE FACT THAT ONE PASSING FROM A SIDEWALK CROSSING** in a city stops upon the track of a street-railroad, without first looking to see whether a car is approaching or not, is not, as a matter of law, negligence, whether the cars accustomed to run on such track are horse-cars or grip-cars. The question whether the sufferer was negligent must be determined by the jury in such case with regard to all the surrounding circumstances, and his conduct cannot be said, as a matter of law, either to be negligent or to be free from negligence. *Chicago City Ry Co. v. Robinson*, 87.
12. **NEGLECT IN RUNNING TRAINS IN OPPOSITE DIRECTIONS.** — If car-tracks are in close proximity, to run a car or train of cars in one direction at rapid speed, and without signal or warning, over a sidewalk crossing, while another car or train bound in the opposite direction is discharging passengers at such crossing, and where the view of the approaching train is obstructed by the standing car from which the person injured has just alighted, this conduct fairly tends to prove culpable negligence on the part of the railway corporation, even though the rate of speed of the approaching train does not exceed that which is permitted by ordinance. *Id.*
13. **CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PARENTS OF A CHILD INJURED** by a railway will not preclude a recovery for such injury, if the child himself was using all the care which the occasion required. *Id.*
14. **QUESTION OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IS FOR CONSIDERATION OF JURY**, where he, an infant seven years of age, was, at the time of the accident, standing, by the invitation of the conductor, on the platform of a street-car, with which the defendant's wagon, which was being driven at a rapid rate, came into collision, causing the injury complained of, and the evidence shows that plaintiff did not see the wagon before the collision, and did not look to see if any wagon was coming. *Connolly v. Knickerbocker Ice Co.*, 617.
15. **FACT THAT PASSENGER ON STREET-CAR STANDS ON OUTER PLATFORM** when there is opportunity to take a seat in the car may, in an action against the railroad company to recover damages as for its negligence, under ordinary circumstances, constitute a defense; but it is not so in an action against another party to recover damages for negligence causing injury to the passenger, because the defendant in such case cannot assert as a defense the mere duty of the passenger in his relation as such to the railroad company. *Id.*
16. **MINOR CHILD'S BEING UPON PLATFORM OF STREET-CAR IN VIOLATION OF CITY ORDINANCE**, while it may be proved as a fact for the consideration of the jury, does not for all purposes necessarily establish negligence on his part. *Id.*
17. **CONTRIBUTORY, OF LAND-OWNER.** — One whose land is overflowed with water, and whose brick-yard and crops on the premises are

submerged, by reason of the negligent construction of a railroad culvert, is not guilty of contributory negligence in afterwards planting crops on the same land, and erecting a brick-yard in the same place, both of which are again submerged from the same cause. *Emery v. Raleigh etc. R. R. Co.*, 727.

18. WHEN THE FACTS ARE ASCERTAINED, QUESTION WHETHER THERE HAS BEEN NEGLIGENCE or contributory negligence, is one addressed to the court. When there is any conflict in the testimony, the courts will lay down the rules of law, and define the standard of care necessary, but will leave the jury to decide whether, under the circumstances, proper care was exercised. *Id.*
- See ANIMALS, 1-3; CRIMINAL LAW, 40-43; DAMAGES, 3, 4; EVIDENCE, 30; HIGHWAYS, 2, 3; LANDLORD AND TENANT, 1, 2; MASTER AND SERVANT, 1-5, 17, 18; MUNICIPAL CORPORATIONS, 1-3; NEGOTIABLE INSTRUMENTS, 4; RAILWAY COMPANIES, 1-8, 10, 14, 19-23.

NEGOTIABLE INSTRUMENTS.

1. MATERIAL ALTERATION OF CHECK AFTER ITS INDORSEMENT, WITHOUT INDORSEER'S CONSENT, is presumed to have been so made as to vitiate it as against him, and the burden is upon the party seeking to recover on it to relieve it from the effect of the unauthorized alteration, by showing that it was made by a stranger to the instrument. *National Ulster etc. Bank v. Madden*, 633.
2. TITLE TO COMMERCIAL PAPER RECEIVED FOR COLLECTION BY BANK, and forwarded to its correspondent in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted upon the general account in anticipation of collections. Title passes only by a contract to that effect, either expressly proved or inferred from an unequivocal course of dealing. *National P. Bank etc. v. Seaboard Bank*, 612.
3. WHERE BANK ON WHICH RAISED DRAFT IS DRAWN PAYS IT through mistake, upon its presentation to it by a correspondent bank, as agent, to which it is forwarded for collection, the collecting bank cannot be compelled to repay if it has paid over to its principal before notice of the mistake. *Id.*
4. PROMISSORY NOTE—MAKER SIGNING NOTE WITHOUT KNOWING ITS CONTENTS—BONA FIDE INDORSEER FOR VALUE AND BEFORE MATURITY.—Maker of a promissory note who signs the same without knowing its contents, because he cannot read or write, and relying on false representations by the payee that it was a mere memorandum of agency, is guilty of such carelessness and undue confidence that, as between himself and an indorsee in good faith for value and before maturity, he must bear the loss and pay the note. *Bedell v. Herring*, 307.
5. PROMISSORY NOTE—FRAUD IS NO DEFENSE AGAINST BONA FIDE INDORSEER FOR VALUE AND BEFORE MATURITY.—Maker of a promissory note can not defend, it seems, on the ground that the note was procured from him by fraud, as against an indorsee in good faith for value and before maturity. *Id.*
6. EVIDENCE.—One of two joint promisors whose names appear on the face of a negotiable instrument may show by parol evidence that he signed only as surety, if the payee had notice that one was a surety. But if such payee indorses the instrument before maturity to one without

notice, who in turn indorses it to still another, after maturity, who takes for value, and without notice, the fact that one of the promisors was a surety cannot be shown as against the last taker. *Lewis v. Long*, 725.

7. **LEGAL RELATION OF PARTIES TO BILL OR NOTE TO EACH OTHER IS PRESUMED** to be that indicated by the order in which their names stand upon it. The maker is liable to the payee, the payee to his indorsee, and so on down the line of indorsements. The last indorsee is presumed to be the holder and owner of the note, and entitled to its proceeds. *Temple v. Baker*, 926.
8. **LIABILITY ON IRREGULAR OR ANOMALOUS INDORSEMENT.** — In an action to recover upon a note, it appeared that the defendant had indorsed the note, and had also written his name under the words "credit the drawer," on the face of the note, before the maker had signed it or the blank had been filled with the names of the payees, whose names were afterwards placed on the back of the note under the defendant's indorsement. In such case, the defendant's legal liability was that of second indorser only, and he incurred no liability to the payees. His indorsement could not be turned into a contract to guarantee payment of the note by parol testimony, because of the Pennsylvania statute of frauds of 1855; and the words "credit the drawer" implied no promise or undertaking on the part of the defendant, but were a direction to all persons to whom the note might be presented to treat with the drawer as the owner, notwithstanding the apparent title of the indorsee. *Id.*

See EVIDENCE, 4; SCHOOLS, 1, 2.

NEW TRIAL.

1. **GRANTING NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE** is a matter purely discretionary, whether the motion is addressed to the court below or is made in the appellate court. The general rule is, that when the new testimony tends merely to contradict a witness on the opposite side, a new trial will not be granted. *Brown v. Mitchell*, 748.
2. **JURY AND JURORS — AFFIDAVIT TO IMPEACH VERDICT.** — An affidavit by a juror that the verdict was arrived at by unfair and illegal means, made after the rendition of the verdict, and contradicted by the affidavit of ten of his fellow-jurors, is not ground for a new trial. *McDade v. State*, 216.
3. **MOTION FOR NEW TRIAL OR IN ARREST OF JUDGMENT** cannot be made after the term of court at which the trial was had. *Palatka etc. R. R. Co. v. State*, 395.

See CRIMINAL LAW, 54; TRIAL, 3, 7.

NONSUIT.

See NEGLIGENCE, 10; RAILWAY COMPANIES, 3.

NOTARIES PUBLIC.

See ACKNOWLEDGMENTS; MARRIED WOMEN, 2.

NUISANCES.

JUDGMENT OF CONVICTION OF NUISANCE must be adapted to the nature of the nuisance, and must not be inconsistent with the legal rights of the party convicted. The most accessible and consistent legal means of

abatement of the nuisance must be adopted. *Paluka et. R. R. Co. v. State*, 395.

See RAILWAY COMPANIES, 15; WATERCOURSES, 1.

OFFICE AND OFFICERS.

1. **OFFICIAL BONDS.** — Where a statute imposes the duty of receiving and disbursing a new fund upon certain county officers, but makes no provision for an additional bond to secure the faithful application of such fund, any bond given by the officer after the statute is in force, though in terms providing only for securing the faithful discharge of official duty, and accounting for money received by virtue of his office, will be construed to embrace the new duty, and to constitute a security for its performance. But when the statute imposing the new duty requires, in express terms, an additional bond for its faithful performance, a bond already required of the officer, and conditioned for the faithful discharge of the duties of his office, will not embrace the new duty. *County Board v. Bateman*, 708.
2. **OFFICIAL BONDS — LIABILITY ON.** — **BONDS EXECUTED BY COUNTY TREASURER** as provided by North Carolina code, section 766, and conditioned that he "shall well and truly account for all moneys that may come into his hands by virtue of his office," and faithfully execute the duties of his office, do not cover the duties imposed upon him by section 2554 of the code, which requires him to receive and disburse all public school funds, and to execute a "justified treasurer's bond," "conditioned for the faithful performance of his duties as treasurer of the county board of education," etc., and for any breach of which, action shall be brought by said board. And the board of education cannot maintain an action for the misapplication of the school funds by him, as treasurer of the board of education, on the bonds executed by him as county treasurer. *Id.*

See EXECUTIONS, 4.

PARENT AND CHILD.

1. **ADOPTION — JURISDICTION.** — To give decree of county court adopting child any force or effect, such court must have acquired jurisdiction, — 1. Over the persons seeking to adopt the child; 2. Over the child; and 3. Over the parents of such child. *Furgeson v. Jones*, 808.
2. **ADOPTION.** — **CHILD BY ADOPTION CANNOT INHERIT** from the parent by adoption, unless the act of adoption has been done in strict accord with the statute. *Id.*
3. **RIGHT OF ADOPTION WAS UNKNOWN TO COMMON LAW**, and is repugnant to its principles. Such right, being in derogation of common law, is a special power conferred by statute, and the rule is, that such statutes must be strictly construed. The statute must receive a strict interpretation, and every requirement essential to authorize the court to exercise the special power conferred must be strictly complied with. *Id.*
4. **CONSENT LIES AT FOUNDATION OF STATUTES OF ADOPTION**, and when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject-matter without it. Under the Oregon statutes, if the parents are living, and do not belong to the excepted classes, their consent must be obtained, and is a prerequisite to jurisdiction. *Id.*

See BASTARDY, 1-3; DAMAGES, 3, 4; DEEDS, 5, 6; NEGLIGENCE, 12.

PARTITION.

DISTRIBUTION OF PROCEEDS OF SALE BY ORPHANS' COURT, AND ALLOWANCE OF COMPENSATION TO TRUSTEE. — Where a trustee is appointed by the orphans' court in partition proceedings, and he sells the land, and the proceeds are paid into court in compliance with the terms of the order of sale, the court may adjudicate the trustee's account and make distribution without the intervention of an auditor; and although the trustee furnished no bond, an allowance to him for his services in conducting the sale, etc., of one per centum of the amount realized cannot be regarded as excessive, the sale being an advantageous one, largely the result of the trustee's personal efforts. *Wistar's Appeal*, 917.

See CO-TENANCY.

PARTNERSHIP.

1. **PARTNER'S RIGHT TO SUE CO-PARTNER FOR MONEY LOANED WITHOUT SETTLEMENT OF PARTNERSHIP ACCOUNTS.** — One partner may sue another for money loaned, without a settlement of the partnership accounts, although the borrower intended to put the money into the firm, and does put it into the firm. The loan is not a partnership transaction. *Bull v. Coe*, 235.
2. **ILLEGAL CONTRACT — ACCOUNTING.** — When, in an illegal venture, profits may have been made, an account may be had in equity by one partner against the other, who has them and is seeking to appropriate them to himself, and when there has been a loss in the venture, an adjustment of accounts between the partners, and an obligation given by the debtor partner to the other, an action may be maintained on such obligation. *Crescent Ins. Co. v. Bear*, 331.
3. **GARNISHMENT OF PARTNERSHIP.** — A debt due a partnership cannot be garnished by a creditor of one of the partners, even when such debt is due for insurance on furniture used by the partners solely for gaming purposes, for which alone the partnership existed, especially when the other partner is not a party to the action, as the effect of such proceeding, if allowed, would be to annul the partnership and deprive such partner of what may be his rights in such debt, and to appropriate his property to the payment of another's debts without an opportunity to be heard. *Id.*
4. **PARTNERSHIP PROPERTY IS NOT EXEMPT FROM EXECUTION**, and therefore subject to be set apart for the use of the partners in insolvency proceedings, although it is such property as would be exempt if one partner were the sole owner. *Cowan v. Creditors*, 294.

PAYMENT.

PAYMENT MADE UPON GENERAL ACCOUNT WITHOUT DIRECTION AS TO ITS APPLICATION is applied by the law to the oldest items. *National etc. Bank v. Seaboard Bank*, 612.

See EXECUTIONS, 5; JUDGMENTS, 10; MORTGAGES, 2-4.

PENSIONS.

1. **PENSIONER OF UNITED STATES MAY, UNDER UNITED STATES REVISED STATUTES, SECTION 4747, USE** the money received from his pension in any manner he may see proper, for his own benefit, and to secure the comfort of his family, free from the attacks of creditors. *Holmes v. Tallada*, 880.

2. **PENSIONER OF UNITED STATES, BY INDORSING AND GIVING TO HIS WIFE** a check received for accrued pension, and allowing her to draw the money and purchase land, taking the title in her own name, thereby puts the money beyond the reach of his creditors, and the land is not liable to seizure and sale for his debts. *Id.*

PLEADINGS.

1. **WHAT MAY BE STRUCK OUT AS IRRELEVANT.** — In an action by a widow to recover for the death of her husband, it is not error to strike from her complaint an averment that she has been deprived of the society, company, and companionship of her husband, and has been caused great mental suffering, and that their infant child has been left fatherless. *Terry v. Rodakan*, 420.
 2. **CROSS-BILL.** — Where in a suit in equity defendant files a cross-bill praying affirmative relief, such cross-bill depends on the original suit, and can only be sustained on matters growing out of and germane to it, and such bill must seek equitable relief. *Griffin v. Fries*, 351.
 3. **CROSS-BILL.** — Where in an ejectment suit the plaintiff files a bill to enjoin defendant from cutting and removing timber from the land in dispute, and defendant, answering, denies plaintiff's title, and alleges title in himself, he may, at the same time, file a cross-bill to enjoin plaintiff from prosecuting the ejectment suit, provided equitable relief is sought by the cross-bill, and the facts justify such relief. *Id.*
 4. **DEMURRER** is an admission of the truth of every fact and intent which is sufficiently averred, and no more. *Manning v. Phipps*, 46.
 5. **UNDER CODE SYSTEM OF PLEADING, COURTS HAVE POWER TO ALLOW AMENDMENTS** both before and after judgment. The only limitation on the power is, that no vested right shall be disturbed, and that the cause of action or defense shall not be substantially changed. *Brown v. Mitchell*, 748.
- See **APPEAL**, 4; **ELECTION**, 2, 3; **MINES AND MINING**, 3; **SURETYSHIP**, 2; **VENDOR AND VENDEE**, 3.

PERJURY.

See **CRIMINAL LAW**, 69-71.

PLEDGE.

1. **PLEDGOR'S RIGHT TO TREAT PLEDGEE'S PURCHASE OF PLEDGED PROPERTY AS INVALID—UNREASONABLE DELAY BY PLEDGOR IN DISAFFIRMING SALE.** — Pledgor has a right of election to treat the purchase of the pledged property by the pledgee at his own sale as invalid, but loses such right by failing to exercise it within a reasonable time after being informed of the purchase. *Hill v. Finigan*, 279.
2. **UNREASONABLE DELAY BY PLEDGOR IN DISAFFIRMING PLEDGEE'S PURCHASE OF PLEDGED PROPERTY, WHEN QUESTION FOR JURY.** — Jury may be instructed as a matter of law that the delay of the pledgor in disaffirming the purchase of the pledged property by the pledgee at his own sale was unreasonable, if the facts as to the delay are undisputed; but if the facts are disputed, it is proper to leave the question of reasonableness to the jury. *Id.*
3. **JURY MAY BE INSTRUCTED THAT PLEDGOR RATIFIED PLEDGEE'S PURCHASE OF PLEDGED PROPERTY, IF PLEDGOR UNREASONABLY DELAYED**

TO OBJECT, AND NEGOTIATED FOR REPURCHASE. — Jury may be instructed that the pledgor ratified the purchase of the pledged property by the pledgee at his own sale, if he unreasonably delayed to object, after being informed of the purchase, and treated with the pledgee for the repurchase of a portion of the property, with knowledge of his rights. The instruction simply means that if the pledgor did certain things, he elected to treat the sale as binding. *Id.*

4. **RATIFICATION BY PLEDGOR OF PLEDGEE'S PURCHASE OF PLEDGED PROPERTY — CONSIDERATION NOT REQUIRED.** — Ratification by a pledgor of the purchase of the pledged property by the pledgee at his own sale does not require a consideration or the elements necessary to make a new contract. *Id.*
5. **RATIFICATION BY PLEDGOR OF PLEDGEE'S PURCHASE OF PLEDGED PROPERTY — PLEDGOR'S KNOWLEDGE OF LAW PRESUMED.** — Knowledge of the law, if essential to a ratification by the pledgor of the purchase of the pledged property by the pledgee at his own sale, will be presumed when the contrary does not appear. *Id.*
6. **PLEDGOR CANNOT RETRACT AFFIRMANCE OR DISAFFIRMANCE OF PLEDGEE'S PURCHASE OF PLEDGED PROPERTY.** — Pledgor's election to treat the purchase of the pledged property by the pledgee at his own sale as valid cannot afterwards be retracted; nor can an election to disaffirm the sale be retracted or renewed at a later date for the purpose of increasing the damages. *Id.*

POWERS.

1. **EXECUTION OF POWER OF SALE — ABSENCE OF CONVEYANCE.** — Sale of land by a person in his individual capacity, attended by payment of the purchase-money and entry into possession by the purchaser, but not followed by any conveyance, cannot be regarded as a valid execution of a power of sale lodged in the vendor as executor or trustee, where it is not shown that the proceeds of the sale were applied to the benefit of the *cestui que trust*. *Terry v. Rodahan*, 420.
2. **POWER TO CONVEY — HOW MAY BE EXERCISED.** — Conveyance in form proper and sufficient to transfer the grantor's title, if any he had, will, in the event of his having no title, be regarded as in execution of a power of sale vested in him as the executor of his deceased wife's estate and trustee of their children. *Id.*
3. **INTENTION TO EXECUTE A POWER SUFFICIENTLY APPEARS.** — 1. When there is some reference to the power in the instrument of execution; 2. Where there is a reference to the property which is the subject-matter on which the execution of the power is to operate; 3. Where the instrument of execution can have no operation unless in execution of the power. *Id.*
4. **CONVEYANCE MAY OPERATE AS AN EXECUTION OF A POWER**, though the grantor supposed himself to be the owner of the property, and the conveyance to be a transfer of his title. *Id.*

PROBATE COURTS.

See Courts.

PROCESS.

SERVICE OF PROCESS UPON LEGAL HOLIDAY IS IRREGULAR, and may be pleaded in abatement, or set aside on motion. But a notice of elec-

tion contest, like a summons, is not technically "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. *Whitney v. Blackburn*, 857.

See CARRIERS, 10, 11; CONTEMPT, 7.

RAILWAY COMPANIES.

1. CROSSINGS. — LAW ASSUMES THAT THERE IS DANGER AT RAILROAD CROSSINGS, to avoid which requires the exercise of care and prudence commensurate with the nature of the place or risk involved. And when one approaches a point upon the highway crossed by a railroad track, it is his duty, whether on foot or in a wagon, to exercise a care for his own safety, and especially to look and listen before attempting to cross. *Durbin v. Oregon R. R. & Nav. Co.*, 778.
2. DEGREE OF CARE EXACTED FROM TRAVELER AT CROSSING. — The law imposes a duty upon a person about to cross a railroad to use his eyes and ears, to look out for sign-boards and signals, and to listen for bell and whistle; and although the view of the road be obstructed, he is not relieved from the obligation to listen and ascertain, if he can, whether there is an approaching train. Nor will the fact that the train is behind time, or that it was a special train, or the failure to give the signal of its approach at the crossing, excuse the non-performance of this duty. *Id.*
3. CONTRIBUTORY NEGLIGENCE. — The plaintiff attempted to pass a railroad crossing with a team and wagon. A passenger train had just gone by, and the plaintiff did not expect another train at that time, although she had seen a freight train standing on the track, headed that way, in the town she had just left. She had traveled over the crossing many times a year for several years, was familiar with the place and its surroundings, knew that the view was obstructed by an intervening hill, and regarded the crossing, under the circumstances of its situation, as so dangerous that she had always before stopped and listened, and if she did not hear the train, she, or some companion for her, went forward and looked up the track before venturing to cross it. On this occasion, she drove directly on the track without stopping to look or listen, her team came into collision with a passing engine, killing one horse, and overturning the wagon. In such case, the plaintiff's own negligent act contributed to the injury which she sustained by the collision, and the motion for a nonsuit ought to have been allowed. *Id.*
4. RAILROAD COMPANY IS GROSSLY NEGLIGENT IN BACKING ITS TRAINS ACROSS MAIN STREET in a village, without a brakeman at the rear end as a lookout, and ready, in case of danger, to apply the brakes, and thus prevent collision or accident. *Cooper v. Lake Shore etc. R'y Co.*, 482.
5. NON-EMPLOYMENT OF WATCHMAN AT CROSSING IMPOSES ON RAILROAD COMPANY DUTY of observing additional care in operating its trains across the street, to prevent accidents, even though the fact that it employs no watchman cannot be imputed to it as negligence. *Id.*
6. CHILD CROSSING RAILWAY TRACK AT HIGHWAY IS NOT TRESPASSER, and it is not conclusive evidence of contributory negligence on her part that she stepped upon the track immediately after a train passed without looking up the track to see whether or not another train was following it, going

in the same direction. Persons approaching railroad crossings are generally required to look and listen for approaching trains; but it would be unreasonable to apply this rule under all circumstances, without regard to the condition of things at the time. *Id.*

7. CHILD OF TENDER YEARS IS NOT REQUIRED TO EXERCISE SAME DEGREE OF CARE and circumspection that is required of an adult. *Id.*
8. TESTIMONY OF PECUNIARY CIRCUMSTANCES OF PARENTS IS ADMISSIBLE in an action against a railroad company for the negligent killing of a child. *Id.*
9. ERROR IN ADMITTING IN EVIDENCE "ENGLISH TABLES" TO SHOW AVERAGE DURATION OF LIFE, based upon experience, at certain ages, instead of the American experience as shown in the Michigan statutes, is not prejudicial to the defendant in an action against a railroad company for the negligent killing of a child, where such tables show a less probable duration of life than the American experience. *Id.*
10. NEGLIGENCE. — IT IS DUTY OF RAILROAD COMPANY TO SO CONSTRUCT ITS CULVERTS that they will carry off the water of the streams, over which they are constructed, under all ordinary circumstances likely to occur in the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, though of but occasional occurrence, but it is not bound to so construct them as to carry off overflows which result from extraordinary and unusual rainfalls. *Emery v. Raleigh etc. R. R. Co.*, 727.
11. EVIDENCE OF ONE'S REPUTATION AS AN INTELLIGENT AND EXPERT CIVIL ENGINEER, under whose supervision a railroad culvert was built, is incompetent and inadmissible on the trial of an issue as to whether the culvert was in fact so constructed as to carry off any but an excessive rainfall. *Id.*
12. EVIDENCE. — In an action against a railroad company to recover damages resulting from an insufficient culvert, a witness for the defendant, called as an expert, testified that he built the culvert, and that it was the largest one he ever built. In such case, the plaintiff was properly permitted to show that a culvert built by another corporation, a short distance below over the same stream, was larger than the culvert in controversy. *Id.*
13. CONDEMNATION PROCEEDINGS AS ESTOPPEL. — Injury resulting from the unskillful construction of railroad culverts cannot be estimated as a part of the damage for the right of way of a railroad company, and proceedings for condemnation of the land, to which the land-owner and the company were parties, will not operate as an estoppel in an action by the former for injury to his lands caused by the unskillful construction of culverts by the latter. *Id.*
14. ONE RAILWAY IS NOT ANSWERABLE FOR INJURIES SUFFERED BY THE EMPLOYEES OF ANOTHER RAILWAY while passing over a track of the former upon a train of the latter, unless such injury was caused by a defective track or by some negligence on the part of the servants of the former. *Killian v. Augusta etc. R. R. Co.*, 410.
15. USE OF STREAM AS MOTIVE POWER IN MOVEMENT OF STREET-RAILROAD COMPANY'S CARS upon a street on which the company has no legal right to use it is in the nature of a nuisance, where the manner of such use has the effect to molest an abutting owner in the use and enjoyment of his premises, and he may recover damages for the injury thereby caused to him; and if such use depreciates the rental value of his premises, such

- depreciation is a proper measure of his damages. *Husner v. Brooklyn City R. R. Co.*, 679.
16. ONE TRANSPORTED IN HIS CAR BY A RAILWAY COMPANY cannot recover for any damages occasioned by a defect in such car. *Terry v. Rodakan*, 420.
 17. EMPLOYEE OF RAILWAY, WHO IS. — An employee of a railway who is sent by it over the track of another railway for the purpose of seeing that a train of cars belonging to the former railway is unloaded promptly is an employee of the former road, and not of the road over which he rides. *Id.*
 18. RAILWAYS — JOINT LIABILITY. — If an injury to an employee of a railroad while riding in the cars of his employer over another railway is jointly caused by the trucks or cars of the one and the track of the other, he is entitled to recover from the two railways in the proportion in which the cars of the one and the track of the other contributed to the injury. *Id.*
 19. RAILWAY COMPANY IS BOUND TO USE REASONABLE CARE IN PROVIDING SUITABLE MEANS, appliances, and structures with a view to the safety of its employees, and that they may not be unnecessarily exposed to danger of injury in its service. And where a switchman in its employ, while coupling cars after dark, falls into a cattle-guard near the scales on which the cars are weighed, without knowing it to be there, — he having been but three days in the company's service, — and is injured, the location in question being the place where cars when weighed were commonly and habitually coupled, the jury is warranted in finding that the cattle-guard so located was liable to put the switchman in danger of injury in proceeding to couple cars there without the caution which knowledge of it would enable him to exercise; and that the company in permitting the cattle-guard in that place in the condition in which it was failed to perform its duty to him, and was chargeable with negligence, although it had been usual to couple cars over it, as they came from the scales, and no injury had hitherto resulted from it; and also that, considering his recent entrance into the service, and the fact that his duties had not, up to that time, called him to the place in question, he was not chargeable with contributory negligence, although he had a lighted lantern in his hand at the time the accident happened. *Fredenberg v. Northern C. R'y Co.*, 697.
 20. CONSTRUCTION OF BRIDGES AND TRETTLES — LIABILITY FOR INJURY FROM FLOOD. — A railroad company is bound to bring to the construction of its ways and works the knowledge and skill of engineering generally known and applied in such business, and to provide against such casualties as a cautious and prudent man possessing the same knowledge and skill would or should foresee or anticipate; and in the location and erection of its bridges and trestles, regard should be had to the size and nature of the stream, the character and features of the adjacent country, the relative position and formation of the abutting land, its liability to overflow, with the probable extent and effect thereof. They should be so constructed as not to be subject to the risks and perils arising from rainfall known by experience to be incident to that section of country, though rarely occurring, or which competent and skilled engineers should reasonably anticipate. But the company is not bound to provide against unusual or extraordinary floods, such as have never been known to occur, and which could not have reasonably been foreseen by competence and skill. *Columbus etc. R'y Co. v. Bridges*, 58.

- 21. CONSTRUCTION OF BRIDGES — NEGLIGENCE.** — Where damages are claimed for injury arising from the falling of a trestle while a railway train was attempting to cross in time of unusual and extraordinary flood, unless it is proved that the negligent and insufficient manner in which the trestle was constructed was the real and proximate cause of the injury, or that its insecure and dangerous condition was known to the company, the latter is not liable, and if such flood was of such overpowering and destructive character as to produce the injury, apart from and independent of the particular negligence alleged in the construction of the trestle, there is no liability, though some negligence may have existed in its construction and maintenance. *Id.*
- 22. NEGLIGENCE OF EMPLOYEES — SIGNALS.** — Where a railroad company is liable for the negligence of a watchman or flag-man to give proper signals, unless a signal is given in accordance with the rules of the company prescribing the manner in which such signal must be given, a conductor or engineer is not authorized to rely upon it, and if he does, and injury ensues to him in consequence, and no other negligence contributed to produce it, negligence cannot be imputed to the company. *Id.*
- 23. CONTRIBUTORY NEGLIGENCE — EMPLOYEE.** — Where an engineer in charge of a construction train is killed by the fall of a bridge over which he is attempting to pass in time of unprecedented flood, and the evidence shows that he had examined the bridge the same day, and knew, or ought to have known, that the water was rapidly rising, then if he knew the manner in which the bridge was constructed, the unusual character of the flood, the danger to the bridge from overflow, and the rapid rising of the water, and with such knowledge attempted, without compulsion, necessity, or superior orders, the hazardous passage, his negligence sufficiently contributed to his injury to defeat recovery. *Id.*
- 24. RAILWAY COMPANIES' RIGHT TO COMMON USE OF TERMINAL TRACKS.** — Where the lines of two railways terminate at the same town or city, they may use the same track within such town or city, and when they do so, the track so used becomes, for the time being, the track of the company so using it, and the owner of such track is not answerable to one of its employees for injuries resulting from the negligence of employees of the other road while running its train upon such track. *Georgia R. R. and Banking Co. v. Friddell, 444.*
- 25. RAILWAY COMPANY IS NOT ANSWERABLE FOR INJURIES SUFFERED BY ONE OF ITS EMPLOYEES FROM THE NEGLIGENCE OF THE EMPLOYEES OF ANOTHER RAILWAY** while running over the track of the former, where such track was at a terminal point common to both companies, and both had therefore a right to its use. *Id.*

See CONTRACTS, 1; EASEMENTS, 1, 2; HIGHWAYS, 6-8, 11-13.

ROBBERY.

See CRIMINAL LAW, 14, 15, 72, 73.

SALES.

- 1. RIGHT OF STOPPAGE IN TRANSITU.** — If after the vendor has delivered goods out of his own possession, and put them into the hands of a carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and his right to do this is called the right of stoppage in

transitu. The right arises solely upon the buyer's insolvency, unknown to the vendor at the time of the sale, and is based upon the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. It is a right highly favored on account of its intrinsic justice, and it may be exercised at any time before the goods are actually or constructively delivered by the carrier to the buyer. *Farrell v. Richmond etc. R. R. Co.*, 760.

2. **VENDOR'S RIGHT OF STOPPAGE IN TRANSITU IS PARAMOUNT TO ALL LIENS** against the vendee, even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee, and to the lien of an attachment or execution against the vendee levied before the delivery of the goods to him. *Id.*
3. **CONDITION RETAINING TITLE IN VENDOR OF PERSONAL PROPERTY UNTIL PAYMENT IS MADE, EFFECT OF ON RIGHTS OF INNOCENT PURCHASER.** — In Michigan, the right of a vendor of personal property upon a condition retaining title in himself until payment is made to follow it into the hands of third parties, or to sue them for its conversion, depends upon the good faith of the transaction; and where the purchase is made from the vendee in good faith, and without notice, under circumstances in which the original vendor must have known or contemplated that the property would be sold by his vendee and incorporated into or made part of the freehold, his rights will be made subservient to those of the innocent purchaser. A verdict should, therefore, be directed for the defendants in an action of trover to recover the value of machinery in their mill, where it appears, from the evidence, that the plaintiffs, when they made to the millwright who built the mill for the defendants a conditional sale of the machinery upon condition that the title should not pass to the vendee until payment was made, knew that the machinery was purchased by the vendee for the purpose of placing it in the mill of the defendants, under a contract which bound him to so place it, and knowing that fact, obtained from the defendants, upon the vendee's order, the down payment for the machinery, and guaranteed its shipment, to be used in the mill, and where it further appears that the defendants had no notice or knowledge, when the machinery was placed in the mill, that the plaintiffs still claimed the title to it. *Jenks v. Colwell*, 502.
4. **PARTY AFTER GIVING APPARENT CONSENT TO CONTRACT OF SALE MAY REFUSE TO EXECUTE IT**, or he may avoid it after it has been completed, if the assent was founded on the contract made upon the mistake of a material fact; such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. *Sherwood v. Walker*, 531.
5. **WHERE COW CONTRACTED TO BE SOLD ON UNDERSTANDING OF BOTH PARTIES THAT SHE IS BARRÉN**, and useless for breeding purposes, proves not to be so, the vendor has the right to rescind the contract, and to refuse to deliver the cow. *Id.*
6. **WARRANTY, ALTHOUGH COLLATERAL CONTRACT, MUST FORM PART OF** the transaction involving the sale. If the vendor has possession, no

special form of words is necessary to create the warranty, an affirmation at the time of the sale being sufficient, provided the affirmant intended to warrant, and did not express a mere matter of judgment or opinion. *Heider v. Bast*, 874.

7. PURCHASER OF GOODS WITH WARRANTY IS NOT BOUND TO RETURN THEM upon discovery by him of the breach of the warranty; but he has the right to retain them, and seek his remedy founded upon the breach of the warranty; and this right is not qualified by the fact that the seller was dealing with the property of others to whom he was required to account for the proceeds of sales made by him, where the purchaser, soon after the sale, advises him of his claim for damages for the breach. *Argersinger v. Macnaughton*, 687.

See RAILMENTS, 1; CHATTEL MORTGAGES, 1; DEFINITIONS, 2; ESTOPPEL, 3.

SEDUCTION.

See CRIMINAL LAW, 76, 79.

SCHOOLS.

1. SCHOOL DISTRICT — ORDER DRAWN ON COUNTY SUPERINTENDENT BY TWO TRUSTEES, ONE OF WHOM IS INTERESTED, IS VOID. — Order for a requisition drawn on the county superintendent of public schools by but two of the three trustees of a school district, one of whom is personally interested in the order, and therefore incompetent to act, is void for want of the sanction of a competent majority of the board of trustees, whether the interested trustee has acted fairly or unfairly in the matter. *Shakespeare v. Smith*, 327.
2. SCHOOL DISTRICT — ORDER DRAWN BY TRUSTEES ON COUNTY SUPERINTENDENT IS NOT NEGOTIABLE INSTRUMENT. — Order for a requisition drawn on the county superintendent of public schools by trustees of a school district is not a negotiable instrument in the sense that an innocent holder for value is protected against infirmities in its origin. *Id.*
3. PARTIES — JOINDER OF PARTIES DEFENDANT IN ACTION TO CANCEL ILLEGAL SCHOOL ORDER. — It is proper to join as parties defendant in an action by a taxpayer, to compel the cancellation of an illegal order for a requisition drawn on the county superintendent of public schools by the trustees of a school district, and to restrain the superintendent from drawing a requisition on the county auditor, the parties interested in the order, and the superintendent. *Id.*

SET-OFF.

SET-OFF AGAINST JUDGMENT IS NOT OF RIGHT, but of grace, and is only granted where a special equity is shown to justify it. *Thropp v. Suesse-Anne's Mut. Fire Ins. Co.*, 909.

SODOMY.

See CRIMINAL LAW, 78.

SPECIFIC PERFORMANCE.

INFANCY OF HEIRS OF DECEASED PLAINTIFF IS NOT LEGAL EXCUSE for their failure to perform the contract of their ancestor, in an action to compel a vendor to specifically perform a contract for the sale of land, and the
AM. ST. REP., VOL. XL — 64

laches which would have barred such an action by him will bar a like action prosecuted by them. *Hayes v. Nourse*, 700.

STATUTE OF FRAUDS.

1. To make the statute of frauds available as a defense to be raised by demurrer in equity, the bill must show affirmatively that the contract or promise declared on was not in writing. *Manning v. Pippen*, 46.
2. **MARRIAGE DOES NOT CONSTITUTE PART PERFORMANCE.** — Marriage is not of itself a part performance of a verbal agreement to convey real property, in consideration of the marriage, sufficient to take the case out of the statute of frauds. *Peck v. Peck*, 244.
3. **POSSESSION WHEN PART PERFORMANCE.** — Possession does not constitute a part performance of a verbal agreement by a husband to convey real property to the wife, in consideration of the contemplated marriage, sufficient to take the case out of the statute of frauds, where the wife simply resides upon the property with her husband. *Id.*
4. **VERBAL AGREEMENT TO CONVEY REAL PROPERTY EXECUTED IN EQUITY ON ACCOUNT OF FRAUD — VOLUNTEER WITHOUT NOTICE.** — Equity will enforce a verbal agreement by a husband to convey real property to the wife, in consideration of the contemplated marriage, where the marriage is brought about, without the execution of the conveyance, by means of the husband's fraudulent representations; and the agreement may be enforced against a child of the husband by a former marriage, to whom the husband conveys the property without consideration, notwithstanding the child was innocent of the fraud. *Id.*

See *WILLS*, 8.

STATUTES.

1. **CONSTITUTIONAL LAW.** — Texas acts of March 11 and April 4, 1881, levying an occupation tax and providing for the issuance of a license, are constitutional and valid, and do not contain more than one subject, namely, the exercise of the police power and that of taxation for general revenue; nor do they embrace subjects not expressed in their titles. *Fahey v. State*, 182.
2. **CONSTITUTIONAL LAW.** — While the object of a statute may be to regulate the sale of liquors, to collect revenue, and divers other purposes and objects, still it is constitutional, unless there is more than one subject in the act. *Id.*
3. **CONSTITUTIONAL LAW.** — Though there is more than one subject mentioned in an act, still if they are germane or subsidiary to the main subject mentioned in the title, or if relative directly or indirectly to the main subject, or so long as the provisions are of the same nature, and come legitimately under one subject or denomination, the act is constitutional and valid. *Id.*
4. **CONSTITUTIONAL LAW.** — Though the Texas constitution empowers the imposition of occupation taxes, and requires that taxation shall be equal and uniform, still it does not necessarily mean that equality and uniformity must be provided between different classes of occupations, nor that the same conditions must be imposed upon every class as a condition precedent to the pursuit of such occupation. Hence a statute requiring that retail liquor dealers procure a license and prepay the tax imposed for a year in advance is not unconstitutional, though the

same conditions are not imposed upon all occupations, and so one county may legally impose a larger occupation tax upon one class within its limits than is imposed by another county upon the same class. *Id.*

5. CONSTRUCTION AS TO EXTENT OF AUTHORITY. — An act authorizing the construction of a boom on the south side of a stream is authority to use the shore on that side as part of the inclosure, and to erect, in connection therewith, the piers necessary to complete the inclosure on the other side. *Powers's Appeal*, 882.

See CONSTITUTIONAL LAW, 1-3; ELECTIONS, 4, 7, 26; HIGHWAYS, 10-12; MINES AND MINING, 1; TAXATION, 4; TRUSTS AND TRUSTEES, 2.

STOPPAGE IN TRANSITU.

See CARRIERS, 5; SALES, 1, 2.

SURETYSHIP.

1. SURETY IS NOT DISCHARGED BY CREDITOR'S FAILURE TO PRESENT HIS CLAIM against the estate of the principal debtor, under the laws of California. *Bull v. Coe*, 235.
2. RELEASE OF SURETY BY RELEASE OF PRINCIPAL DEBTOR IS NEW MATTER, and must be pleaded as such. Nor will the omission be supplied by the course of the parties at the trial, unless such course appears clearly and beyond all controversy. *Id.*

See APPEAL, 7; GUARDIAN AND WARD, 2; MARRIED WOMEN, 4; NEGOTIABLE INSTRUMENTS, 6.

TAXATION.

1. ABSTRACT-BOOKS NOT SUBJECT TO. — The Michigan constitution requiring that property shall be assessed at its cash value means, not only such property as may be put to valuable uses, but also such as has a recognizable cash value inherent in itself, and not enhanced or diminished according to the person who owns or uses it. Books of abstracts of title have no intrinsic value, and are only valuable for the information they contain, conveyed by consultation or extracts, hence they are not subject to taxation. *Perry v. City of Big Rapids*, 570.
2. ASSESSMENT. — COURT OF EQUITY CANNOT REVIEW the action of an assessor or board of equalization in making an assessment, unless it can be shown that the assessment was fraudulently made, or that the property assessed was not liable to taxation, or that the legislature has, in authorizing the tax, disregarded or transcended the principles of equality, or that a tax has been levied when not authorized by law. *Hors etc. R. R. Co. v. Donoghue*, 90.
3. AN ASSESSMENT IS NOT SHOWN TO BE FRAUDULENT by proving that the committee of assessment promised an attorney, who appeared before them and made a statement with respect to the property to be assessed, that if they were not satisfied with his statement that they would notify him if they intended to make any assessment, and that they subsequently did make such assessment without complying with their promise. *Id.*
4. TAX SALES — RETROSPECTIVE LAWS. — A statute declaring that hereafter no purchaser at a tax sale shall be entitled to a deed, unless he has complied with certain conditions designated in such statute, applies to sales previously made for which no deed has issued, and for which the landowner yet retains the right of redemption. Such statute is not retro-

spective, for it relates exclusively to acts to be performed after its passage. Neither is it void as impairing the obligation of a contract. *Gage v. Stewart*, 116.

See ADVERSE POSSESSION, 4; STATUTES, 1, 2, 4.

TELEGRAPHS.

See COMMERCE, 1.

TRESPASS.

1. NO MAN HAS RIGHT TO ENTER ON PREMISES OF ANOTHER TO INDOOR HIS EMPLOYEES to leave their employment to the injury of the employer, for the purpose of getting higher wages, or shorter hours of labor for the same pay, or for any other purpose; and if he does so enter, he is a trespasser. *Webber v. Barry*, 466.
2. SEPARATE SUITS MAY BE BROUGHT AGAINST SEVERAL DEFENDANTS for joint trespass; but whenever the plaintiff has actually received satisfaction from one of them for the injury he has sustained, the cause of action is discharged as to all. *Seither v. Philadelphia T. Co.*, 905.
3. EFFECT OF RELEASE OF JOINT TRESPASSER. — When a passenger injured by a collision of street-railway cars brings suit against both companies, a release of the carrying company from all liability for the injury, in consideration of a sum of money paid to the plaintiff, operates as a discharge of the other company from liability also; and this rule applies, although evidence is offered that the collision was due entirely to the negligence of the latter company, and the right of action against it was expressly reserved. *Id.*

See CRIMINAL LAW, 39; DAMAGES, 6; RAILWAY COMPANIES, 6.

TRIAL.

1. SETTLING ISSUES. — ORDINARILY, IT MUST BE LEFT TO SOUND DISCRETION OF TRIAL JUDGE TO DETERMINE whether to submit specific issues, for the purpose of eliciting distinct findings in the nature of a special verdict, or to confine the inquiry, in imitation of the common-law practice, to a single issue, or a small number of issues, provided, always, that the issues submitted are raised by the pleadings. *Emery v. Raleigh etc. R. R. Co.*, 727.
2. IT IS MISLEADING TO EMBODY IN ONE ISSUE TWO PROPOSITIONS, as to which the jury might give different responses, and on exception taken in apt time, a new trial will in such cases be granted. The facts found by a jury, whether comprehended under one or many issues, must be sufficient to enable the court to proceed to judgment. *Id.*
3. NEW TRIAL WILL NOT BE GRANTED when the judgment can be predicated upon the findings, although it appears that issues tendered by a party were refused by the trial judge, if the jury were told by the judge how the testimony relating to the rejected issues should be considered in connection with the law, in passing upon the issues submitted. *Id.*
4. NO LIMIT WILL BE IMPOSED TO EXERCISE OF DISCRETION ON PART OF TRIAL JUDGE IN SETTLING ISSUES, except that the facts established by the verdict shall constitute a lawful basis for the judgment, and that a party shall not be denied an opportunity to have the law applicable to any material portion of the testimony fairly presented to and passed upon by the jury, through the medium of some issue. *Id.*

5. **ISSUE. — EXERCISE OF DISCRETION ON PART OF TRIAL JUDGE IN SETTLING ISSUES** is without limit, except that the facts found by the jury shall sustain the judgment, and a party must not be denied the opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury, through the medium of some one of the issues submitted. *Brown v. Mitchell*, 748.
6. **WAIVER OF OBJECTION TO PROSECUTING ATTORNEY'S PARTICIPATING IN CIVIL ACTION.** — A defendant in a civil action, by pleading to a declaration filed by an attorney who participated in a criminal prosecution against the same defendant, growing out of the same state of facts that is relied upon for a recovery in the civil action, thereby waives any objection he might have taken to such attorney's commencing said action. If he knows of the attorney's participation in the criminal prosecution, he must make his objection at the beginning, and if he does not know of it then, he must make his objection as soon as he finds it out. He cannot be permitted, knowing of such participation, to sit by and allow such attorney to select a jury, without objection, and then object to the swearing of the jury or the giving of any testimony in the case. *Webber v. Barry*, 466.
7. **INTEMPERATE COMMENTS BY COUNSEL, NOT WARRANTED BY FACTS AND CIRCUMSTANCES** shown by the proofs in the case, should be checked and controlled by the trial court, and if this is not done, the appellate court will see that the injustice is corrected, and a new trial granted. *People v. Aikin*, 512.
8. **QUESTION OF WHAT IS ORDINARY CARE** and what is negligence is one exclusively for the jury. Hence it is error for a court to instruct the jury that if a man having power to choose between two positions chooses the less safe, he must be presumed not to have exercised ordinary care, and if injured while occupying such position by the negligence of the defendant, when he would not have been injured had he occupied a position of greater safety, he cannot recover for his negligence. *Terry v. Rodahan*, 420.
9. **EVIDENCE — PROVINCE OF JURY.** — It is right of jury, and not of the court, to determine the effect of evidence, unless in particular cases where its effect is declared by law. *Patterson v. Hayden*, 822.
10. **RULE OF COURT.** — No agreement between parties or counsel as to the trial of a cause is of any effect before the court unless the evidence of it is in writing, and subscribed by the party against whom it is alleged or made, in open court, and noted by the judge in his minutes. *Palatka etc. R. R. Co. v. State*, 395.

See EVIDENCE, 16.

TROVER.

1. **SALE BY AGENT ON CREDIT, WHERE THERE IS AUTHORITY TO SELL**, though in violation of his principal's instructions, passes the title, and is not a conversion, where the purchaser has no notice of the limitation of the agent's authority. *Loveless v. Fowler*, 407.
2. **TROVER CANNOT BE SUSTAINED AGAINST AN AGENT FOR SELLING THE GOODS OF HIS PRINCIPAL ON CREDIT**, when his instructions were to sell for cash only. *Id.*

3. DEMAND. — TROVER CANNOT BE SUSTAINED AGAINST A BAILEE OR AGENT BY HIS PRINCIPAL for goods in the possession of the former, in the absence of any demand for the possession of such goods. *Id.*

TRUSTS AND TRUSTEES.

1. DEED OF TRUST. — BENEFICIARIES IN A DEED OF TRUST NEED NOT be designated by name. Hence a deed of trust to secure such farmers and dairymen as should furnish the grantor with milk to be manufactured into butter and cheese is not void for want of designated beneficiaries. *First Nat. Bank v. Schween*, 174.
 2. RESULTING TRUST IN FAVOR OF ONE WHO ADVANCES PART OF PURCHASE PRICE — INTEREST OF HEIR IS NOT CONSIDERATION FOR DEED OF ENTIRE TRACT. — Trust results to a mother who furnishes a portion of the purchase price of land, the title to which is taken in the name of the father, to an extent corresponding to the proportion of the price furnished by her, and the child can claim as her heir; but the child's interest as heir is not a consideration for a deed of the entire property from the father to the child. *Peek v. Peek*, 244.
 3. VALIDITY OF TRUST UNDER STATUTE RELATING TO ACCUMULATIONS. — By the terms of a deed of trust, the trustee was required to pay over the income and dividends of the trust estate to M., "and should the said M. die, the said trust herein declared shall inure to the benefit of her heirs; but if she have no children, the same shall revert to my estate"; and there was a further direction to add fifty dollars per year out of the income to the principal. The deed was executed in Illinois, the beneficiary was a citizen of Colorado, and the trustee was a Pennsylvania corporation. After the execution of the deed, M. gave birth to a child, and the grantor subsequently died without having in any manner exercised the power of revocation reserved in the deed. In such case the estate of M. was merely an equitable estate for life, which did not become absolute by the birth of issue, and was not enlarged by the remainder to her heirs; and the mere fact that the trustee was a Pennsylvania corporation did not invalidate the trust, under the act of 1853, section 9, concerning accumulations, since the trust was valid by the law of the state where made and of the state where it was to be enjoyed. *Fowler's Appeal*, 902.
- See AGENCY, 7; DEEDS, 2; MINES AND MINING, 1-3; MORTGAGES, 7; PARTITION, 1; POWERS, 1; WILLS, 7.

VENDOR AND VENDEE.

1. MISREPRESENTATIONS made by the vendor as to a material fact, knowing at the time that it was false, and upon which the vendee relies, are actionable. *Williams v. McFadden*, 345.
2. MISREPRESENTATIONS made by the vendor which are tantamount to an estimate or opinion, such as value, condition, character, adaptability to certain uses, or the like, are not actionable, unless the seller resorts to some fraudulent means to prevent the purchaser from examining his property. *Id.*
3. FALSE REPRESENTATIONS — PLEADING. — In an action for damages for false representations by a vendor, the vendee must allege that such representations were material, made with knowledge that they were false, and that he relied upon and was misled by them. *Id.*

4. **RULE OF DAMAGES FOR FALSE REPRESENTATIONS** in the sale of land is the difference between its actual value, and its value if the alleged facts regarding it had been true. *Id.*
5. **MISREPRESENTATIONS.** — The fact that the vendee took possession of the land, and had other transactions with the vendor without expressing dissatisfaction, does not estop him from bringing an action for false representations made by the vendor in the sale of the land. *Id.*
6. **FALSE REPRESENTATIONS — EVIDENCE.** — Where the vendor has made a written description of land and placed it in the hands of his agent, and referred the vendee to it as a correct description of the property before the sale, such writing is admissible in evidence as a representation as to the land. *Id.*
7. **FALSE REPRESENTATIONS.** — Where a vendor makes false representations concerning land sold, believing them to be true, he cannot be held responsible in an action on the case for deceit. *Id.*
8. **FALSE REPRESENTATIONS QUESTION FOR JURY.** — The fact of the knowledge of the vendor as to the truth or falsity of his representations in the sale of land is for the jury. *Id.*
9. **RECOVERY OF MONEY PAID ON VOID LAND CONTRACT.** — An action to recover money paid on void land contracts is not premature on the ground that the invalidity of the contracts was declared in an adjudication subsequent to the commencement of this action. *Wright v. Dickinson*, 602.
10. **FAILURE TO MAKE TITLE UNDER CONTRACT TO CONVEY.** — Purchase-money paid for land can be recovered in an action for money had and received, whether the consideration fails for want of title or for want of a valid contract to convey, and in either case the purchaser must place the vendor *in statu quo*, so far as it is practicable for him to do so; and the equities, so far as they can be measured by a pecuniary standard, can be settled and adjusted in the suit. *Id.*
11. **CONTRACT TO CONVEY — FAILURE TO MAKE TITLE — TENDER OF PERFORMANCE.** — Where the vendee has agreed to purchase and the vendor to convey land in fee, and the latter cannot make title, the former may bring his action to recover the purchase-money paid without first tendering performance. *Id.*
12. **CONTRACT TO CONVEY — FAILURE OF TITLE — RESCISSION OF VOID CONTRACT.** — A void contract for the purchase of land need not be rescinded before bringing an action to recover the purchase-money paid under it. *Id.*
13. **CONTRACT TO PURCHASE — RESCISSION — STATU QUO.** — Where property received under a contract to purchase has been changed or lost without the fault of the vendee, so that it cannot be restored in specie, but its value may be ascertained, and the vendee is entitled to rescind the contract, he may do so without tendering performance, or placing the vendor *in statu quo*, and in an action to recover the money paid on the contract, the equities of the parties will be fully adjusted. *Id.*
14. **ORIGINAL EQUITY REATTACHES TO PROPERTY IN HANDS OF GRANTEE OF BONA FIDE PURCHASER, WHEN.** — The rule that the grantee of a *bona fide* purchaser of real estate takes a good title thereto, although he takes it with full knowledge of an equitable claim thereto existing in another person, is subject to this exception, that if the transfer is back to the original purchaser, who was guilty of constructive fraud in transferring the property, when it becomes revested in him, the original equity will reattach to it in his hands. *Clark v. McNeal*, 638.

15. **MERE POSSESSION OF PROPERTY CONFERS NO POWER TO SELL IT**, and an unauthorized sale, although for a valuable consideration, and to one having no notice that another is the true owner, vests no higher title in the vendee than was possessed by his vendor. *Smith v. Clews*, 627.

See **COURTS**, 1, 2; **POWERS**, 1.

WATERCOURSES.

1. **DIVERSION — NUISANCE — INJUNCTION.** — To divert or unreasonably obstruct a watercourse is a private nuisance, actionable at law, and in such cases equity will interfere by injunction to prevent irreparable damage and avoid a multiplicity of suits. *Ulbricht v. Bufaula W. Co.*, 72.
2. **RESERVATION OF RIPARIAN RIGHTS IN GRANT.** — Where a grantor owning land on both sides of a river conveys to his vendee a portion of the land so situated for the purpose of enabling the latter to furnish water for a certain town, but reserves all easements and riparian rights in his other lands, including water rights and privileges, such reservation retains in the grantor nothing which he would not have retained without it, the right of water being appurtenant to the land itself as part of the realty, and not affected by the conveyance. *Id.*
3. **RIPARIAN RIGHTS.** — Every riparian owner of land through which streams of water flow has a right to the reasonable use of the running water, which is a private right of property annexed and incident to the freehold, being a real or corporeal hereditament in the nature of an easement, and must be enjoyed with reference to similar rights of other riparian proprietors. *Id.*
4. **RIPARIAN RIGHTS.** — Every riparian owner has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity, or alteration in quality, with the limitation that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes. *Id.*
5. **RIPARIAN RIGHTS.** — The diversion of water from a stream by a riparian owner for the purpose of supplying the wants of a neighboring town, without restoring it to its natural channel where it is accustomed to flow, is a wrongful act, for which an action will lie by a lower riparian owner, without proof of special damage, but he is entitled to recover only nominal damages, unless he shows affirmatively that he has suffered some special damage. *Id.*
6. **RIPARIAN RIGHTS — INJUNCTION.** — Where the grantee, an upper riparian owner, acquired his lands of the grantor, the lower riparian proprietor, for the express purpose of supplying a neighboring town with water without returning it to the stream, and it appears that the grantor is taking no advantage of his usufructuary right, but allows the water to flow by unutilized, it appearing to be of no special value to him, he is entitled to an injunction for the wrongful diversion, only so far as it is necessary to vindicate his right, and prevent the loss of it, by adverse user and lapse of time. *Id.*

WARRANTY.

See **FACTOR**, 1, 2; **SALE**, 6, 7.

WILLS.

1. **CONSTRUCTION OF WORDS "DEATH WITHOUT ISSUE."**—If a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death, or death without issue, before the testator. The first taker, in such case, is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life. *Stevenson v. Fox*, 922.
2. **DEVISE OF LIFE ESTATE TO A, WITH REMAINDER IN FEE TO HIS HEIRS AT LAW**, vests in him an estate in fee, and this result cannot be avoided by other parts of the devise, showing that the intent of the testator was to give A a life estate only. *Carpenter v. Van Olinder*, 92.
3. **RULE IN SHELLEY'S CASE.**—THE TESTATOR'S MANIFEST INTENT CANNOT CONTROL the legal operation of the word "heirs," when standing for the ordinary line of succession as a word of limitation. If the term "heirs" is used in an instrument, comprehending the whole class of heirs, and they become entitled on the death of the ancestor to the estate in the same manner and to the same extent, and with the same descendible qualities as if the grant or devise had been simply to A. and his heirs, then the word "heirs" is a word of limitation, and the intention will not control the legal effect of the word. *Id.*
4. **A DEVISE OF THE USE OF THE LAND IS EQUIVALENT** to the devise of the land itself, and carries the legal as well as the beneficial interest therein. *Id.*
5. **RULE IN SHELLEY'S CASE.**—A DEVISE TO TESTATOR'S WIFE AND DAUGHTERS OF THE USE OF HIS PROPERTY, to be divided among them as the same would be by law without a will, except that none of his real estate was to be disposed of for their use, but to be kept sacred for their heirs, vests the devisees with estates in fee-simple absolute in his real property. *Id.*
6. **PROMISE IN WRITING TO MAKE A WILL** in consideration of a deed executed at the time is supported by a valuable consideration, and is valid and binding, unless assailed on some other sufficient ground. *Manning v. Pippen*, 46.
7. **PROMISE TO MAKE WILL—TRUST AGAINST WIFE.**—A promise by the wife, in writing, to make her will and bequeath to her husband one third of her estate, including and in consideration for lands deeded to her by him, is based upon a valuable consideration, and binding; and though equity cannot decree specific performance, still, if the wife dies without fulfilling her promise, equity will declare a trust upon her estate as for unpaid purchase-money, and indemnify the husband to the extent he has suffered from the breach of promise, out of any property which should have become his under the promised will. *Id.*
8. **PROMISE TO MAKE WILL—STATUTE OF FRAUDS.**—An oral promise by a wife to make her will in favor of her husband in consideration of land deeded by him to her is void as within the statute of frauds. *Id.*
9. **PROMISE TO MAKE WILL—FRAUD.**—Where a wife, in consideration of lands deeded her by her husband, promises to execute her will in his favor, and does so with fraudulent intent not to comply with her promise, and she does not comply with it during her lifetime, the fraud will vitiate the transaction, and equity will restore the husband to the rights he had before the execution of the deed. *Id.*

See DEEDS, 3; LIMITATION OF ACTIONS, 2.

WITNESSES.

1. PERSON NOT CALLED AS WITNESS IN HIS OWN BEHALF, nor in behalf of a person who has succeeded to his interest, is not incompetent to testify under section 829 of the Code of Civil Procedure. *Clark v. McNeal*, 638.
2. A CREDIBLE WITNESS under the Texas statute is one who, being competent to give evidence, is worthy of belief. *Wilson v. State*, 180.
3. WITNESS CANNOT, ON CROSS-EXAMINATION, BE ASKED WHAT DEFENDANT SAID AT MEETING, where the plaintiff has introduced no testimony of the meeting, or of what was said or done at it. *Webber v. Barry*, 466.
4. PARTY AS WITNESS AGAINST DECEASED PERSON. — In an action by an heir to recover possession of realty, the defendant is a competent witness in his own favor, notwithstanding the death of the plaintiff's ancestor, under whom both parties claim, as to any matters except such as transpired between defendant and such ancestor. *Terry v. Rodakan*, 420.
5. WITNESS IS COMPETENT TO EXPRESS HIS JUDGMENT AS TO VALUE OF PROPERTY, where he testifies that he is familiar with such property, that he has bought and sold property of that grade, and for eight years has been engaged in a business in which such property is bought and sold. *Hansen v. Hackmeister*, 691.

See CRIMINAL LAW, 2, 16, 41; DEPOSITIONS.

